Supreme Court, U.S.
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No.

IN THE

Supreme Court of the United States

LEONARD A. PELULLO,

Petitioner,

v.

UNITED STATES OF AMERICA,

Respondent.

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE THIRD CIRCUIT

PETITION FOR A WRIT OF CERTIORARI

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QUESTION PRESENTED

Under *Harrison v. United States*, 392 U.S. 219 (1968), what is the standard of proof to be met by the government when it seeks to prove that a defendant's first trial testimony was not induced by a violation of *Brady v. Maryland*, 373 U.S. 83 (1963), and thus is admissible in the retrial caused by the *Brady* violation?

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The opinion below is reported at 173 F.3d 131 (3d Cir. 1999). It is reproduced in the Appendix at 1-37a. Rehearing was denied, in an unpublished order. App. 38-39a. The opinion of the district court is reported at *United States v. Pelullo*, 6 F. Supp. 2d 403 (E.D. Pa. 1998). It is reproduced in the Appendix at 39-94a.

STATEMENT OF JURISDICTION

Judgment was entered by the Third Circuit Court of Appeals on March 18, 1999. App.1a. Rehearing and rehearing *en banc* were denied on April 30, 1999. App.37a. Jurisdiction is invoked pursuant to 28 U.S.C. § 1254(1).

CONSTITUTIONAL PROVISION

U.S. Constitution, Fifth Amendment

> No person . . . shall be compelled in any criminal case to be a witness against himself; nor be deprived of life, liberty, or property, without due process of law . . . .

STATEMENT OF THE CASE

The petitioner, Leonard A. Pelullo, has been tried four times on the same multiple count wire fraud and RICO violations. The theory of the government's case has been that the petitioner diverted to his personal use monies loaned to his company to refurbish art deco hotels in Miami Beach, Florida.

Petitioner's first trial conviction was reversed on all counts except Count 54. *United States v. Pelullo*, 964 F.2d 193 (3d Cir. 1992). He was retried and convicted on the reversed counts. The Court of Appeals again vacated the conviction. *United States v. Pelullo*, 14 F.3d 881 (3d Cir. 1994). Pelullo testified in both of those trials.

Prior to his third trial, the government gave Pelullo *Brady* material, which had not been previously disclosed. After receiving the *Brady* material, Pelullo moved to vacate the Count 54 conviction. The District Court denied that motion.

Pelullo was then tried a third time on the other counts. Pelullo did not testify. That trial resulted in a deadlocked jury. He was then tried a fourth time. Again, he did not testify. But at the fourth trial the government introduced and read to the jury part of his testimony at the first trial. He was convicted. On appeal from the fourth trial conviction, Pelullo contended that his first trial testimony should not

have been used because that testimony was induced by the government's *Brady* violations; that without the subsequently revealed *Brady* evidence, Pelullo's only way to impeach the government witnesses at the first trial was to testify. He also sought review of the denial of his motion to vacate the Count 54 conviction.

The Court of Appeals agreed that there had been a *Brady* violation and granted a new trial on Count 54. *United States v. Pelullo*, 105 F.3d 117, 124 (3d Cir. 1997). As to the other counts of conviction, which the government obtained at the fourth trial using Pelullo's first-trial testimony, the court remanded for an evidentiary hearing under *Harrison v. United States*, 392 U.S. 219 (1968). At that hearing, the government had to prove "whether Pelullo would have testified in the first trial anyway even if the government had complied with its Brady obligations." 105 F.3d at 125; *see* App. 8-9a. No standard of proof was prescribed. *See* App. 10-11a.

On the remand, the District Court found that Pelullo's decision to testify at the first trial was not caused by the *Brady* violation. App. 93-94a. The court below affirmed:

> We hold that the District Court did not clearly err in concluding that the government established *by a preponderance* "that Pelullo's testimony at the first trial was obtained by means sufficiently

> distinguishable from the *Brady* violation to be purged of any taint arising from that violation."

App. 16a (emphasis supplied). Pelullo had contended in the district court, and on appeal, that pursuant to *Harrison* the proper standard of proof was "beyond a reasonable doubt," not preponderance of the evidence.

The Court of Appeals rejected Pelullo's contention. It likened the *Harrison* inquiry to exclusionary rule inquiries, and concluded that the preponderance of the evidence standard sufficed. App. 13-16a. It then addressed the "seven contested findings, which provide the primary rationales for the District Court's conclusion that Pelullo would have testified even in the absence of a *Brady* violation." App. 18a. The court acknowledged "the force of Pelullo's response to the district court's (and the government's) arguments on [one] point" (App. 26a); and that Pelullo's arguments about another finding were "compelling" (App. 20a); and that "this is not the only inference that the District Court could have drawn from these facts" (*id.* at 22a); and that as to another view of a fact, that "an alternate reading is possible" (*id.* at 31a); and that "the District Court's findings of fact were not uniformly correct. . . . " App. 32a.

Nevertheless, the court concluded: "we cannot say that the District Court clearly erred when it found

that the government proved by a preponderance of the evidence that Pelullo would have testified during the first trial even if the withheld material had been made available to him." App. 32a.

The question presented is whether the preponderance of the evidence standard was the proper standard for the *Harrison* inquiry following a *Brady* violation. The standard of proof almost always makes a difference; here the opinion below leaves no doubt that the outcome would have been different if the government had to meet the beyond a reasonable doubt test.

REASONS FOR GRANTING THE WRIT

Depending upon how one reads *Harrison v. United States*, 392 U.S. 219 (1968), the decision below either conflicts with *Harrison*, or presents an important question left unanswered by *Harrison*.

1. The Conflict

The defendant in *Harrison* "testified only after the government had introduced into evidence three confessions, all wrongfully obtained. . . ." 392 U.S. at 222. The Court framed the Fifth Amendment issue:

> The question is not whether the petitioner made a knowing decision to testify, but why. If he did so in order to overcome the impact of confessions illegally obtained and hence improperly introduced then his testimony was tainted by the same illegality that rendered the confessions themselves inadmissible.

Id. at 223.

The Court held that since the government had "illegally placed [Harrison's] confessions before the jury," the Government must show that its illegal action did not induce his testimony." *Id.*, at 225. The important issue presented in this petition is the standard of proof for that showing by the government: beyond a reasonable doubt, or preponderance of the evidence?

Harrison's statement of what the government must show cited *People v. Spencer*, 424 P.2d 715, 722 (1967); and ("*compare*") *Chapman v. California*, 386 U.S. 18, 24 (1967). *Harrison*, 392 U.S. at 225, n. 12. *People v. Spencer* used the beyond a reasonable doubt standard of proof: the state "fail[ed] to dispel beyond a reasonable doubt the possibility that the defendant took the stand in an attempt to mitigate" the effect of the illegal confession. 424 P.2d at 724. Likewise, *Chapman* requires that the "beneficiary of a constitutional error" has the burden to demonstrate

"beyond a reasonable doubt that the error complained of did not contribute to the verdict obtained." 386 U.S. at 24.

Harrison's citation of *Spencer* and *Chapman* reasonably supports the conclusion that "beyond a reasonable doubt" is the proper standard for measuring whether a defendant's trial testimony was induced by the Government's constitutional violations.

If our reading of *Harrison* and its references to *Spencer* and *Chapman* is right, the use of the preponderance standard in the court below was wrong, and conflicts with *Harrison*.

2. The Important But Unanswered Question

The court below took a narrow view of *Harrison's* message: "[T]he *Harrison* court gave no indication that it wished to adopt *Spencer's* standard of proof analysis, citing *Spencer* only for the proposition that the government bears the burden of disproving causation. We refuse to read more into the Court's decision to cite *Spencer*." App.13a n.3. Instead, the court below, "by virtue of the fact that *Harrison* did not explicitly set out the government's standard of proof," concluded that the testimonial causation inquiry should be likened to suppression hearings and that preponderance of the evidence should be the applicable standard of proof. App.13a.

Thus, the decision below concluded that the question now presented was not answered by this Court. The Court should provide a clear answer to the standard of proof question, if *Harrison* did not already do so (as we maintain) by its references to *Spencer* and *Chapman*. If *Harrison* only decided *what* the government must prove, it is important that the Court answer *how* the government must discharge its burden, especially in the context of *Brady* violations. Because the government's *Brady* obligation exists in every criminal case, all the consequences of a *Brady* violation should be clearly established by this Court.

3. Another Conflict or Unanswered Question: Do the Exclusionary Rule Cases Govern the *Harrison* Inquiry *vis-a-vis* a *Brady* Violation?

The court below analogized the *Harrison* inquiry to exclusionary rule inquiries:

> We believe the Court in *Harrison* mandated what is essentially an exclusionary rule inquiry where there appears to be a link between a constitutional violation and a defendant's subsequent decision to take the stand.

* * *

> In light of *Harrison*'s exclusionary rule framework, and by virtue of the fact that *Harrison* did not explicitly set out the government's standard of proof, we look to other exclusionary rule cases for guidance on the proper standard of proof.

App. 12-13a.

The exclusionary rule analogy does not work in the context of a *Brady* violation. *Brady v. Maryland*, 373 U.S. 83 (1963), is aimed at assuring a fair trial. *See United States v. Agurs*, 427 U.S. 97, 107 (1976). The rules governing suppression of evidence or confessions that are illegally obtained have a different purpose:

> [T]he exclusionary rules are very much aimed at deterring lawless conduct by police and prosecution and it is very doubtful that escalating the prosecution's burden of proof in Fourth and Fifth Amendment suppression hearings would be sufficiently productive in this respect to outweigh the public interest in placing probative evidence before juries for the purpose of arriving at truthful decisions about guilt or innocence.

Lego v. Twomey, 404 U.S. 477, 489 (1972).

A new trial granted for a *Brady* violation means that the government had withheld probative evidence relating to guilt or innocence. Requiring the government to prove beyond a reasonable doubt that the defendant would have waived his Fifth Amendment privilege against self-incrimination and testified, even if the government had not withheld that evidence, would make the retrial a fair reprise of the first trial. *See Chapman*, *supra*, p. 6. The beyond a reasonable doubt standard of proof serves the purpose sought by *Brady* – a fair trial – a purpose distinct from that served by the exclusionary rule.

If *Harrison* already requires the first trial testimony inquiry to meet the reasonable doubt standard, there is conflict. If *Harrison* does not set a standard, then the decision below presents two important but unanswered questions: (1) What is the standard of proof, and (2) is the *Harrison* standard of proof in a *Brady* violation case (where the defendant was unaware at trial of the constitutional violation) different from that applied when a confession has been improperly admitted by the trial court? [1]

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[1] Justice Harlan's dissent in *Harrison* illustrates the difference we posit. He viewed trial testimony as a knowingly chosen trial strategy risk: "believing that error has been committed that will result in reversal on appeal, they must nevertheless present a defense and in so doing may help the other side on retrial." 392 U.S. at 228 (Harlan, J., dissenting). A *Brady* violation is different because the defendant, making the decision to testify, does not know that the government has withheld

CONCLUSION

This Court should grant certiorari to either resolve the conflict between the decision below and *Harrison*, or to answer the important question or questions left open by *Harrison*.

Respectfully submitted,

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evidence. That defendant cannot be said to have knowingly and intelligently "waive[d] his privilege against compulsory self-incrimination with respect to the testimony he gives." *Harrison*, 392 U.S. at 222.

Filed March 18, 1999

UNITED STATES COURT OF APPEALS
FOR THE THIRD CIRCUIT

NO. 98-1527

UNITED STATES OF AMERICA

v.

LEONARD A. PELULLO,
Appellant

On Appeal From the United States District Court
For the Eastern District of Pennsylvania
(D.C. Crim. No. 91-cr-00060)
District Judge: Honorable Robert F. Kelly

Argued: January 27, 1999

Before: BECKER, Chief Judge, SCIRICA, and ROSENN,
Circuit Judges.

(Filed March 18, 1999)

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OPINION OF THE COURT

BECKER, Chief Judge.

I. Introduction

This appeal by defendant Leonard Pelullo, arising out of his conviction at his fourth trial in the District Court for wire fraud and civil RICO violations, brings his case before this Court for the fourth time as well. *See United States v. Pelullo*, 964 F.2d 193 (3d Cir. 1992) ("*Pelullo I*"); *United States v. Pelullo*, 14 F.3d 881 (3d Cir. 1994) ("*Pelullo II*"); *United States v. Pelullo*, 105 F.3d 117 (3d Cir. 1997) ("Pelullo III"). The appeal follows our remand in *Pelullo III* for the District Court to determine whether Pelullo would have testified at his first trial regardless of the government's *Brady* violations, which we identified in *Pelullo II* and *Pelullo III*. In remanding, we did not decide the quantum of the government's burden of proving that fact. The District Court concluded the burden was a preponderance of the evidence, though it went on to find by clear and convincing evidence that the government's *Brady* violation did not cause Pelullo to testify. *See United States v. Pelullo*, 6 F. Supp. 2d 403 (E.D. Pa. 1998).

We devote our attention in this appeal to two issues. First, we consider whether the District Court applied the correct standard of proof. Second, if the District Court applied the correct standard, we must decide

whether it erred in concluding that the government successfully met its burden. We agree with the District Court that the proper standard of proof is preponderance of the evidence and that the government met this standard at the evidentiary hearing. Accordingly, we will affirm on these points. We dispose summarily of Pelullo's remaining contentions: (i) that the District Court should have recused itself; and (ii) that the District Court erred in changing Pelullo's sentence from two-year suspended sentences on forty-eight counts following the first trial to four-year active sentences on those counts following the fourth trial, finding these contentions patently lacking in merit.[1] However, the government does not counter Pelullo's contention that the District Court erred in modifying Pelullo's sentence from a non-committed fine to a committed fine withoutfinding that he had the present ability to pay the fine. We agree. Therefore, when the mandate is returned to the District Court, the District Court shall amend the judgment to reflect that the fine is a non-committed fine.

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[1] With regard to the latter point, we note that because we are affirming Pelullo's conviction on Counts 1 and 55, which amount to a twenty-four year sentence, and because the District Court designated the four-year sentences to run concurrently with Counts 1 and 55, the change in the sentence has no practical effect on the time Pelullo will serve, as Pelullo now concedes.

II. Facts and Procedural History

The facts in this case have been set forth in detail in previous opinions, and hence we only set forth those facts necessary to decide the narrow issues before us. In 1991, Pelullo was indicted on 54 counts of wire fraud and one RICO count. The government alleged in Counts 1-53 that Pelullo, the CEO of a public company called Royale Group, engaged in two schemes to divert for his personal use money loaned to Royale that was to be used to refurbish several art deco hotels it owned in Miami. In Count 54 of the indictment, the government alleged a third, similar scheme: that Pelullo had diverted $114,000 from a Royale subsidiary to pay off part of a $250,000 loan that Anthony DiSalvo, a loan shark with purported ties to the Philadelphia Mafia, had made to him. The government's theory was that Pelullo submitted false documentation, including fabricated financing requests, that allowed Royale to obtain loan money in excess of the expenses it actually incurred and that Pelullo, as CEO, diverted the excess funds for his personal use.

The government's case against Pelullo on Count 54 was based primarily on the testimony of two FBI agents, Randal Wolverton and Michael Leyden, and of an admitted mafia underboss named Philip Leonetti. Wolverton testified that Pelullo, in a June 14, 1990, interview with FBI agents (including Wolverton and Leyden), had admitted using the $114,000 to pay off

DiSalvo. Leonetti testified that he met with Pelullo in January 1986 at the Florida home of Nicodemo Scarfo, who was Leonetti's uncle and the reputed boss of the Philadelphia mob, to tell Pelullo that he had to repay DiSalvo. In late February 1986, Pelullo wired $114,000 from a business bank account to his father's company (LRP, Inc.) in Philadelphia. One of Pelullo's brothers (Arthur) allegedly converted the wire transfer to cash and gave the cash to their other brother (Peter) to drop off at DiSalvo's home in Philadelphia.

In response to this testimony, Pelullo took the stand and contradicted Wolverton's claim that Pelullo had admitted to using Royale funds to repay his DiSalvo debt. He claimed that he had not started to pay off the DiSalvo loan until August 1986 and that the $114,000 in question had been used to repay an intercompany debt in February. The jury, apparently unconvinced by that defense, convicted Pelullo of Count 54, 48 other counts of wire fraud, and the RICO count. We vacated this conviction as to every count but Count 54, which we affirmed. *See Pelullo I*, 964 F.2d at 222. We vacated the other convictions because the government had failed to authenticate bank records.

The government subsequently corrected the error, and in 1993, Pelullo was retried and convicted on all counts. Again, we vacated the entire conviction and remanded for retrial. *See Pelullo II*, 14 F.3d at 907. We concluded that the District Court had erred in instructing the jury that Pelullo's previous conviction

on Count 54 conclusively established a RICO violation. *See id.* at 897. We also noted that the government had committed a *Brady* violation by failing to turn over an IRS memorandum detailing a meeting between IRS Agent James Kurtz and Leonetti, but we concluded that this violation did not affect the trial's outcome. *See id.* at 887.

Prior to the third trial, the government gave Pelullo three more pieces of *Brady* evidence. The first piece was Wolverton's rough notes of the June 14, 1990, interview during which Pelullo discussed the $114,000 transaction. The notes included the words, "repaying intercompany debt." That statement appeared nowhere in the FBI's 302 report, although it ostensibly corroborated Pelullo's defense. The second piece of *Brady* material was rough notes of Agent Kurtz's interview with Leonetti. Those notes referenced "summer 1986," although that date was not included in Kurtz's final memo. The third piece of material was the FBI surveillance log of Nicodemo Scarfo's Florida residence for January 1986. These logs do not list Pelullo as a visitor to the residence during that month.

In his first two trials, Pelullo had taken the stand, but in his 1994 and 1995 trials he did not. In his 1994 trial, the District Court was forced to declare a mistrial when the jury failed to reach a verdict. In his fourth trial, although Pelullo did not testify in person, the government read a portion of his testimony from the first trial into the record. At the end of the fourth

trial, in early 1995, the jury convicted Pelullo on 46 wire fraud counts and the RICO violation.

Pelullo appealed from the judgment in the fourth trial, challenging his convictions on the 46 wire fraud counts and the RICO count, his sentence on those counts, and his earlier conviction on Count 54. With regard to his convictions following the fourth trial, Pelullo claimed that he had been forced to take the stand at the first trial solely because the government had violated his constitutional rights by failing to meet its *Brady* obligation. Without the subsequently-revealed *Brady* evidence in hand, Pelullo argued, he had no other way to impeach the three government witnesses. He alleged that his testimony in the first trial was essentially "fruit from a poisonous tree" and that his testimony, read into the record at the fourth trial, tainted the fourth trial as well.

We agreed that there had been a *Brady* violation relating to Count 54[2] but remanded to the District Court for an evidentiary hearing. *See Pelullo III*, 105 F.3d at 125. *Inter alia*, we held that the District Court had erred in allocating to Pelullo the burden of proof on the *Brady* issue and gave the government the opportunity to establish, in accordance with *Harrison*

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[2] Accordingly, we reversed Pelullo's conviction from the first trial on Count 54, and that Count is not presently before us. *See* 105 F.3d at 127.

v. United States, 392 U.S. 219 (1968), that Pelullo would have testified in his first trial even if the government had complied with its *Brady* obligations. *See Pelullo III*, 105 F.3d at 126. If the government were unable to prove that Pelullo's testimony in his first trial was not prompted by its *Brady* violation, it would be problematic for the government to have used his testimony from the first trial as evidence in the fourth trial. In other words, the government had to prove that Pelullo's decision to testify at the first trial was not caused by the *Brady* violation. On remand, the District Court held a hearing and made 69 findings of fact based on the evidence from the hearing, its review of the records of the first two trials, its observation of Pelullo's demeanor at all four trials, and its analysis of Pelullo's attorney's testimony about strategy at the first trial. It concluded that the government met its burden by clear and convincing evidence (i.e., by more than a preponderance). Pelullo appeals from this decision.

The District Court's legal determination of the government's requisite standard of proof is subject to denovo review. *See Polselli v. Nationwide Mutual Fire Ins. Co.*, 23 F.3d 747, 750 (3d Cir. 1994). We review its factual findings about the effect of the *Brady* material on Pelullo's trial strategy for clear error. *See Maine v. Taylor*, 477 U.S. 131, 145 (1986); *Campbell v. United States*, 373 U.S. 487, 493 (1963). A finding is " `clearly erroneous' when although there is evidence to support it, the reviewing court on the entire evidence is left

with the definite and firm conviction that a mistake has been committed." *United States v. United States Gypsum Co.*, 333 U.S. 364, 395 (1948). Where there are two permissible views of the evidence, the fact finder's choice between them cannot be clearly erroneous. *See Anderson v. City of Bessemer City*, 470 U.S. 564, 574 (1985). Our review of the sufficiency of the district court's findings of fact on the sentencing issue is plenary. *See United States v. Seale*, 20 F.3d 1279, 1284 (3d Cir.1994).

III. Discussion

A. Standard of Proof

We must first decide whether the District Court correctly required the government to meet its evidentiary burden by only a preponderance of the evidence or whether, as Pelullo urges, the Court should have required the government to prove beyond a reasonable doubt that Pelullo would have testified at his first trial even if he possessed all of the later-disclosed *Brady* material. While we made clear in *Pelullo III* that a defendant's testimony may be subject to suppression if compelled by a *Brady* violation, we did not direct the District Court to apply a particular standard of proof when we remanded for the evidentiary hearing. Instead, we stated:

> [B]ecause the district court misallocated the burden of proof under *Harrison [v. United States*, 392 U.S. 219 (1968)], we

> vacate the district court's denial of Pelullo's Rule 33 motion for a new trial and remand for a new hearing on that motion consistent with this opinion. On remand, the government should be afforded an opportunity to demonstrate, consistent with its burden of proof, that Pelullo would have testified during his first trial even if the withheld material had been turned over.

Pelullo III, 105 F.3d at 126.

As instructed, the District Court looked to *Harrison* for guidance. In *Harrison*, the Supreme Court decided that a defendant's trial testimony must be excluded if that testimony is "impelled by the prosecution's wrongful use of his illegally obtained confessions." 392 U.S. at 224. In allocating the burden of proof, the Supreme Court reasoned, "Having `released the spring' by using the petitioner's unlawfully obtained confessions against him, the Government must show that its illegal action did not induce his testimony." *Id.* at 225. The Court did not, however, articulate what standard of proof applies to the government's burden.

At the evidentiary hearing, the government argued--and the District Court implicitly accepted--that *Harrison* was an exclusionary rule case and that the proper standard under such an inquiry is a preponderance of the evidence standard. The Court reasoned that the Supreme Court has applied a

preponderance standard when the government has the burden of showing that evidence is not tainted by, or did not flow directly from, a constitutional violation and is therefore not subject to suppression under the exclusionary rule. Pelullo disputes the characterization of *Harrison* as an exclusionary rule case, contending that the government should face a "beyond a reasonable doubt" standard because *Harrison* cites *Chapman v. California,* 386 U.S. 18 (1966), which held that "before a federal constitutional error can be held harmless, the court must be able to declare a belief that it was harmless beyond a reasonable doubt." 386 U.S. at 24. As will be discussed below, Pelullo misunderstands the import of *Harrison* and the nature of the evidentiary hearing at issue in this case. The exclusionary rule mandates that evidence derived from constitutional violations may not be used at trial because illegally derived evidence is considered "fruit of the poisonous tree." *Wong Sun v. United States,* 371 U.S. 471, 487-88 (1963). The Supreme Court in *Wong Sun* explained that it is important to determine whether the derived evidence came directly from the exploitation of the constitutional violation or whether the derived evidence was obtained "by means sufficiently distinguishable to be purged of the primary taint." *Id.* at 488. The exclusionary rule serves to deter constitutional violations by denying the government the benefit of those violations, and accordingly, "the application of the rule has been restricted to those areas where its remedial objectives are thought most

efficaciously served." *Segura v. United States*, 468 U.S. 796, 804 (1984).

Courts have developed a number of exceptions to the exclusionary rule, including the independent source, inevitable discovery, and attenuation doctrines, and a good faith exception. *See, e.g., Segura*, 468 U.S. at 805 (independent source); *Nix v. Williams*, 467 U.S. 431, 441-44 (1984) (inevitable discovery); *Nardone v. United States*, 308 U.S. 338, 341 (1939) (attenuation); *Arizona v. Evans*, 514 U.S. 1, 14 (1995) (good faith). The independent source, inevitable discovery, and attenuation doctrines recognize that where the causal link between the constitutional violation and later-revealed evidence is tenuous or, indeed, non-existent, the later-revealed evidence can be said to be untarnished by the constitutional violation and therefore may be admissible.

The *Harrison* Court recognized the importance of examining that causal link to determine whether the government's use of a defendant's illegal confession at trial induced the defendant to take the stand to testify and, in doing so, make a number of admissions that might not have come out but for that testimony. *See Harrison*, 392 U.S. at 224-25. While acknowledging that a number of factors inevitably play a part in a defendant's decision to testify, the Court concluded that the government had failed to prove that the defendant's testimony was obtained by means sufficiently distinguishable from the underlying

constitutional violation. *See id.* at 225-26. We believe the Court in *Harrison* mandated what is essentially an exclusionary rule inquiry where there appears to be a link between a constitutional violation and a defendant's subsequent decision to take the stand.

Pelullo presses a "beyond a reasonable doubt" standard on us, based on *Harrison's* citations to *Chapman*.[3] The *Chapman* Court observed that as "the beneficiary of a constitutional error," the state must prove "beyond a reasonable doubt that the error complained of did not contribute to the verdict obtained." *Chapman*, 385 U.S. at 24. This language has become commonplace in harmless error analyses. However, the issue in *Harrison*, and indeed at the evidentiary hearing, was whether the defendant's trial testimony was corrupted by an earlier constitutional violation; at no point had it been determined that the trial testimony itself was a constitutional violation to which a harmless error

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[3] Pelullo also makes much of the fact that *Harrison* cited *People v.Spencer*, 424 P.2d 715 (Cal. 1967). *See Harrison*, 392 U.S. at 225 n. 12, 88 S.Ct. 2008. In *Spencer*, the Supreme Court of California held that the government had to prove beyond a reasonable doubt that the defendant did not take the stand as a result of the government's use of an improper confession in court. *See* 424 P.2d at 724. But the *Harrison* Court gave no indication that it wished to adopt *Spencer's* standard of proof analysis, citing *Spencer* only for the proposition that the government bears the burden of disproving causation. We refuse to read more into the Court's decision to cite *Spencer*.

analysis might be applied. Critically, the inquiry in *Harrison* was a causation inquiry, not an inquiry into the effect of a constitutional violation on the verdict.

In light of *Harrison*'s exclusionary rule framework, and by virtue of the fact that *Harrison* did not explicitly set out the government's standard of proof, we look to other exclusionary rule cases for guidance on the proper standard of proof. Courts almost invariably have required the government to prove only by a preponderance of the evidence that the causal link between the constitutional violation and the later-revealed evidence is sufficiently weak or remote to merit admission of that evidence. For example, in *Nix*, the Supreme Court determined that the government must prove by a preponderance that the police would have inevitably discovered the victim's body without the help of an illegally obtained confession. *See Nix*, 467 U.S. at 444 n.5. The Court was unwilling to impose a higher standard of proof because a higher standard would impose "added burdens on the already difficult task of proving guilt in criminal cases by enlarging the barrier to placing evidence of unquestioned truth before juries." *See id.*; *see generally United States v. Matlock*, 415 U.S. 164, 177 n.14 (1974) ("[T]he controlling burden of proof at suppression hearings should impose no greater burden than proof by a preponderance of the evidence."); *Lego v. Twomey*, 404 U.S. 477, 488 (1972) ("[N]o substantial evidence has accumulated that federal rights have suffered from determining admissibility by a preponderance of the

evidence.").

Lower courts have followed the Supreme Court's lead, expanding the preponderance standard to the independent source doctrine and attenuation cases. The Tenth Circuit in *United States v. Lin Lyn Trading, Ltd.*, 149 F.3d 1112, 1116 (10th Cir. 1998), held that the government had to prove by a preponderance that the evidence in question came from an independent source or that the discovery of the evidence was so attenuated from the constitutional violation as to escape the violation's taint. Likewise, in *United States v. Dudden*, 65 F.3d 1461 (9th Cir. 1995), the Ninth Circuit concluded that if the government wished to use evidence against a defendant to whom it had granted statutory immunity without violating the Fifth Amendment, it had to prove by a preponderance that it had obtained that evidence from a source independent from the defendant's own testimony. *See id.* at 1468; *see also United States v. Vasquez De Reyes*, 149 F.3d 192, 195 (3d Cir. 1998)
(requiring government to prove inevitable discovery by a preponderance);[4] *United States v. Griffin*, 48 F.3d

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[4] In *Vasquez*, we expressed concern about applying the inevitable discovery exception to testimonial evidence. However, in *Vasquez*, the defendant was illegally stopped by an INS agent who suspected that she was an illegal alien. After producing papers showing that she was married to a resident of the Virgin Islands, but after failing to show a visa, she was taken to a correctional facility. Her husband arrived at the facility and, after being questioned, revealed that their marriage was a sham. As a

1147, 1151 (10th Cir. 1995) (requiring government to prove by a preponderance its independent source and inevitable discovery theories); *United States v. Bartel*, 19 F.3d 1105, 1112 (6th Cir. 1994) (requiring proof of independent source by preponderance). The purpose of the evidentiary hearing in the District Court was much like an exclusionary rule inquiry in which the government argues that it would have obtained the evidence anyway under the inevitable discovery or independent source doctrines. The government was given the chance to prove that Pelullo would have testified at the first trial--and the government would have thus "obtained" his testimony therefrom--even if Pelullo possessed all of the *Brady* material before the first trial. For the foregoing reasons, we agree with the District Court's conclusion that the government had to

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result, Mrs. Vasquez De Reyes confessed to the sham. She later filed a motion to suppress her statement based on the illegal nature of the original stop, but the district court found that the sham nature of the marriage would have inevitably been discovered through an INS investigation of her marriage when she applied to live in the U.S. On appeal, Vasquez De Reyes argued that there were too many variables to find that a routine INS investigation would have inevitably disclosed the sham. We agreed, noting that the statement that the government sought to have admitted under the exception was a "statement not yet made," which by nature is not capable of ready verification. 149 F.3d at 195-96. In Pelullo's case, however, the issue is not what Pelullo would or would not have testified to, which clearly would require speculation, but whether he would have testified, which is a less speculative and more easily verifiable determination.

meet its burden by a preponderance of the evidence.

B. The Government's Proof

In light of our conclusion that the District Court held the government to the correct standard of proof at the evidentiary hearing, we must decide whether the District Court clearly erred in finding that the government had met its burden at the hearing. We hold that the District Court did not clearly err in concluding that the government established by a preponderance "that Pelullo's testimony at the first trial was obtained by means sufficiently distinguishable from the *Brady* violation to be purged of any taint arising from that violation." *See Pelullo, 6* F. Supp. 2d at 413. We first review the general scheme of Count 54 and then address in detail the seven factual findings explicitly contested by Pelullo.

Count 54 of the indictment was based on a wire transfer made on February 26, 1986. Pelullo transferred $114,000 from the account of Palm Beach Heights, a Royale subsidiary, to LRP, Inc., a company owned by Pelullo's father. The government alleged that Pelullo performed the wire transfer and used the transferred corporate funds to repay the money he had borrowed from DiSalvo.

As proof of this diversion for personal use, the government relied first on Leonetti's testimony and IRS Agent Kurtz's notes from an interview with

Leonetti. Leonetti testified that at the end of December 1985, DiSalvo asked him to help collect DiSalvo's loan to Pelullo. Leonetti then stated that he told Scarfo, his "boss," about DiSalvo's request, whereupon they contacted Pelullo in Florida. Leonetti testified that Pelullo came to Scarfo's house in Florida in January 1986, at which time they pressured him to repay the DiSalvo loan.[5] The government sought to connect the timing of this meeting with the February wire transfer. The government also relied on Agents Wolveton'sand Leyden's testimony. Both agents testified that Pelullo admitted, during the June 1990 interview with them, that he had used the $114,000 belonging to Palm Beach Heights to repay the DiSalvo debt.

During his testimony about Count 54 at the first trial, Pelullo admitted that DiSalvo had lent him money, but denied that the $114,000 had been used to repay DiSalvo, or that he had told the agents that it had. Pelullo also denied ever meeting Leonetti, although he acknowledged that he knew who Leonetti was. He admitted going to Scarfo's house, but claimed that he

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[5] The third piece of *Brady* material, the FBI surveillance logs of Scarfo's house, did not list Pelullo as a visitor to the house in January. However, the logs only covered twelve days in January, *see Pelullo III*, 105 F.3d at 123 n.3, and thus appear to be of little help to Pelullo's case.

went there to consult with a friend who was doing construction for Scarfo. Finally, Pelullo testified that he only began to repay the DiSalvo debt in August or September 1986, and that the loan was not fully paid off until 1987. The District Court made 69 findings of fact; we discuss only the seven contested findings, which provide the primary rationales for the District Court's conclusion that Pelullo would have testified even in the absence of a *Brady* violation.

1. Propensity to Testify

The District Court concluded that Pelullo's prior course of conduct established "a long history of voluntarily waiving his fifth amendment privilege." *See United States v. Pelullo,* 6 F. Supp. 2d 403, 414 (E.D. Pa. 1998). The Court referred to a number of instances in which Pelullo had testified under oath
or had voluntarily given interviews to the FBI about the subject matter of various indictments, including this one. While we are hesitant to conclude that someone has a "propensity" to testify, the District Court draws a number of valid inferences. From the situations in which Pelullo had waived his Fifth Amendment privilege, including an example where Pelullo testified and was acquitted, the Court inferred that "Mr. Pelullo believed he could persuade the jury that he was telling the truth." *See id.* The District Court also hypothesized that after testifying in his own defense in the first two trials and being convicted both times, Pelullo may have decided to change tactics in

the third trial. *See id.* Pelullo tries to refute this conclusion by arguing that his behavior in the third and fourth trials (i.e., his decision not to testify there) shows that he does not have a propensity to testify. However, this is an area in which we will defer to the District Court, which has observed Pelullo's demeanor and conduct over the course of seven years.

2. Entitlement Defense

At the evidentiary hearing, the government attempted to show that Pelullo's entire defense--to each of the three discrete schemes that underlay the various counts--was a defense of entitlement; that is, Pelullo's response to the government's accusation that he had embezzled money was that he was entitled to the money. If the government succeeded in showing that Pelullo needed to testify about each scheme in order to proffer his entitlement defense, then it would be clear that the *Brady* information was neither especially useful to Pelullo nor relevant to his decision to testify. The District Court, adopting the government's theory, placed great weight on this factor. Specifically, it stated:

> I find that the government has established by clear and convincing evidence that Mr. Pelullo waived his fifth amendment privilege and voluntarily agreed to testify at the first trial so that Mr. Pelullo could present a defense to the jury by explaining that he was

> entitled to use the Royale corporate funds in the manner that he did, and therefore, he did not commit fraud as charged in the indictment. I further find that the *Brady* material does not and cannot establish or even support the `entitlement' defense Mr. Pelullo sought to establish through his direct testimony.

6 F. Supp. 2d at 412; *see also id.* at 421.

In response, Pelullo points to trials three and four. If it really were necessary for him personally to take the stand to present his entitlement defense, Pelullo argues, then he would have had to testify in the third and fourth trials. Noting that the government's case on Counts 1-53 did not materially change throughout the four trials, Pelullo submits that his silence in the third and fourth trials shows that he had no need to take the stand in his own defense once he had the *Brady* material.

While this is a compelling argument, we cannot hold that it was clearly erroneous for the District Court to give weight to Pelullo's defense strategy in his first two trials. The reason Pelullo did not testify in the third trial was most likely a combination of factors: his testimony in the first and second trials had not convinced the jury; his attorney felt that Pelullo could set forth his entitlement defense well enough using just his father's (and others') testimony; and the *Brady*

material gave extra support to his defense. That is, it is highly probable that Pelullo learned certain things about his case as the first two trials played out, and that some of that knowledge played a role in his decision not to testify at the third trial. While the District Court did not make specific findings about Pelullo's defense strategy at his third trial, we cannot conclude that it was clearly erroneous to give weight to Pelullo's strategy in the first trial, even though that strategy had obviously changed slightly by the third trial.

3. Counts 1-53

The District Court found that each count of wire fraud would expose Pelullo to five years imprisonment; that Scheme One alleged that Pelullo diverted $1.6 million in loan proceeds; that Scheme Two alleged that Pelullo diverted $471,000 of corporate funds; but that Scheme Three (which encompassed Count 54 only) alleged a diversion of $114,000. See 6 F. Supp. 2d at 409. The District Court also noted that the government had a strong case against Pelullo on Counts 1-53; the prosecution introduced approximately thirty witnesses, in addition to voluminous documentary evidence, to prove Pelullo's guilt on those counts. *See id.* Highlighting the fact that only six of Pelullo's 116 pages of direct testimony related to Count 54, the Court concluded, "[T]he vast majority of Mr.
Pelullo's testimony was dedicated to providing a defense to the heart of the government's case, namely

the two fraudulent schemes charging Mr. Pelullo with defrauding [his companies] of over $2 million." *See id.* at 411.

In sum, the District Court found that the government clearly established that Pelullo had stonewalled Royale's accountants to conceal his diversion of corporate funds, and that absent an explanation justifying that diversion, the jury would easily have returned guilty verdicts on Counts 1-53. *See id.* at 412. In light of this finding, the Court concluded that the *Brady* material would not have deterred Pelullo from testifying about his entitlement defenses to the weightier charges of diversion in Counts 1-53. Therefore, the Court found, Pelullo's testimony at the first trial was "obtained by means sufficiently distinguishable from the *Brady* violation to be purged of any taint arising from that violation." *See id.* at 413. The Court then inferred that Pelullo, having decided to testify about Counts 1-53, knew he would be subject to cross-examination about Count 54 and testified about Count 54 issues on direct examination to diffuse their potency. *See id.*

The Court drew support for its conclusion from another situation at the first trial. Well into the first trial, one of Pelullo's attorneys, Dennis Richard, told the Court that the defense would call two more witnesses before it decided whether to put Pelullo on the stand. After calling those two witnesses, neither of whom testified about anything related to the DiSalvo loan or the

$114,000 wire transfer, the defense decided to call Pelullo as a witness. The District Court found that this decision supported the government's position that Pelullo would have testified even if the *Brady* material had been disclosed. *See id.* at 417-18. The Court apparently reasoned that the decision whether to call Pelullo hung on what those two witnesses managed to convey; that the defense knew at that point that those witnesses would have nothing to say about the $114,000; and that Pelullo had to take the stand to convey additional information that the two witnesses had not imparted, information unrelated to the DiSalvo loan. *See id.* at 418. While this is not the only inference that the District Court could have drawn from these facts, it is a viable inference, and thus we cannot find clear error.

4. Whitaker

Although Pelullo did not bear the burden of proving the causal connection between the *Brady* violation and his testimony, he nevertheless introduced the testimony of Glenn Whitaker, his attorney from the first trial. Whitaker testified as follows:

> Q: What were the determining factors in that decis ion to have [Pelullo] testify [at the first trial]?

> W: Well, primarily that we had two F.B.I. agents testifying about a meeting at which Mr. Pelullo was present, and their testimony needed to be rebutted about a particular reference that's contained in this 302 [report] . . . .
>
> Q: Is that the reference that is at Page JA-774, the last four lines?
>
> W: Yes. The reference is that a $114,000 wire transfer from the debtor-in-possession account to LRP, Inc., was used to repay Tony DiSalvo. We felt it essential that we call Mr. Pelullo to respond to that, because, quite frankly, there was no other way to deal with that issue. In addition, we felt that we were required to respond to the testimony of Mr. Leonetti about his contacts with Mr. Pelullo, and, again, there was no one else available to deal with that, and there was no effective cross-examination material to deal with those witnesses.

6 F. Supp. 2d at 408. Whitaker further stated that Pelullo was put on the stand to deny that he made the statement alleged in the 302 report and to deny that he had had direct contact with Leonetti. *See id.* at 408-09. In addition, Whitaker noted that he felt that they had "adequate defenses and adequate presentation as to the other counts. Count 54 was the one [they were]

most concerned about." *See id.* at 409.

The Court considered five factors in weighing Whitaker's credibility: (i) Whitaker spoke with Pelullo after we remanded for an evidentiary hearing; (ii) Whitaker reviewed our opinion in *Pelullo III*; (iii) Whitaker reviewed the *Brady* material before testifying at the evidentiary hearing; (iv) Whitaker understood the purpose of the remand hearing; and (v) Whitaker testified that the law firm he worked for when he represented Pelullo was owed over $100,000 in legal fees. *See id.* at 419. Coupled with the Court's incredulity that, counter to Whitaker's testimony, Pelullo would not have defended himself against Counts 1-53 in person using his entitlement defense, the Court found these factors rendered Whitaker's testimony unbelievable. However, as Pelullo points out on appeal, most prepared witnesses would meet factors (i)-(iv). It is also doubtful that Whitaker would feel an obligation to help his old firm obtain outstanding fees. Had the District Court relied on factors (i)-(v) alone in questioning Whitaker's credibility, we might well have found clear error. But the District Court made further findings about Whitaker that affect the calculus.

For instance, Whitaker's closing argument troubled the District Court. The Court observed that Whitaker's closing at the first trial did not mention the evidence Pelullo now claims was the sole reason he testified. *See id.* at 416. In fact, in closing, Whitaker conceded for the sake of argument that the $114,000 may have been

used to repay DiSalvo, as the government had contended. Whitaker then argued that Pelullo was nevertheless entitled to use the money for that purpose:

> [L]et's assume that Peter Pelullo used that money to repay Tony DiSalvo. Let's assume that what the Government has said is correct, and we deny it, and the evidence doesn't establish that that happened in any way, shape [or] form. But let's assume he did that. . . . Because again, Peter Pelullo was entitled to the money as compensation and he could use that money any way that he wanted to use it. And if he wanted to use it to repay a debt of his son, if he wanted to use [it] to take to the racetrack . . . whatever it was that he wanted to do with it, it was his business.

Id. at 417.

In the District Court's view, the quoted language called into question the asserted reason that Pelullo testified, since Whitaker did not mention Pelullo's testimony rebutting Leonetti and Wolverton. Second, it illustrated the importance of the entitlement defense to Pelullo's case and bolstered the District Court's conclusion that Pelullo would have testified anyway to set forth that defense.

The District Court was troubled by yet another of

Whitaker's trial strategies. The Court thought that when Pelullo reviewed Wolverton's formal report and saw that the report included an "admission" that the $114,000 went to pay off DiSalvo, Whitaker should have requested Wolverton's rough notes of the interview to see whether those notes correlated with the formal report. *See id.* at 419. Instead, Whitaker merely filed a pretrial motion asking that the rough notes be preserved so that they would be available for use at trial. Whitaker did not ask to see the rough notes after Wolverton and Leyden testified.

The District Court found a final reason to disbelieve Whitaker. It properly noted the "questionable" impeachment value of the surveillance logs, *see Pelullo III*, 105 F.3d at 123 n.3 (noting that the logs only covered twelve days in January), and therefore found unpersuasive Whitaker's testimony that having the logs available would have influenced Pelullo's decision to testify in thefirst trial. *See id.* at 421.

Pelullo strongly opposes the District Court's (and the government's) supposed intimations that Whitaker's conduct was less than impeccable and objects to their putative slur on his professional reputation. We do not find such supposed aspersions to have been made; indeed, it appears to us that Whitaker is a highly reputable (and capable) lawyer. We also acknowledge the force of Pelullo's response to the District Court's (and the government's) arguments on this point. However, taking as a whole the Court's findings about

Whitaker, we cannot conclude that it clearly erred in choosing not to credit Whitaker's testimony about the reasons Pelullo testified in the first trial.[6]

5. Ambiguous Testimony at the First Trial

The District Court devoted a number of its findings to a comparison between Whitaker's testimony about why Pelullo took the stand and what Pelullo actually testified to on the stand at the first trial. Finding that Pelullo did not testify unambiguously about the things he had purportedly planned to testify to, the District Court inferred that Whitaker's testimony was not entirely believable and appeared to be an "after-the-fact" explanation of why Pelullo took the stand. *See id.* at 414-15.

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[6] The District Court was mistaken when it faulted Whitaker for failing to cross-examine Wolverton and Leyden about the content of their notes. The Court concluded, "Mr. Whitaker's failure to even broach this subject during the cross-examination of Agents Wolverton and Leyden at the first trial raises a significant doubt that Mr. Pelullo told Mr. Whitaker before the first trial that he had made the statement`repaying intercompany
debt' during his interview with the agents." *See* 6 F. Supp. 2d at 420. However, as Pelullo points out, Whitaker had nothing with which to confront the agents, in light of the *Brady* violation. Whitaker did cross-examine the agents on other issues, but he can hardly be faulted for believing he had nothing to cross-examine the agents with on the $114,000 question. This fact does not, however, alter our ultimate conclusion.

Specifically, Whitaker stated that Pelullo wanted to tell the jury his version of events; with regard to the FBI interview, the Court perceived that version to be a clear statement that Pelullo used the $114,000 to "repay company debt." But the Court found that Pelullo never explicitly offered this explanation. *See id.* at 415. Instead, the Court noted that Pelullo testified at trial, "I said I don't remember the $114,000 going to pay Tony DiSalvo, but I do have or did have a loan with Tony DiSalvo." *See id.* The Court concluded that the "two versions of what Mr. Pelullo supposedly told the FBI agents are irreconcilable." *See id.*

We disagree. The District Court apparently wanted Pelullo to testify verbatim about what he ostensibly told the FBI agents, but that was not within its power to require. At all events, the two versions are not irreconcilable. The District Court ignored the segment of Pelullo's testimony that came just before the above-quoted language. In response to a question about the circumstances of the February wire transfer, Pelullo stated, "That transfer was a transfer that I made to authorize to LRP for moneys that my dad was owed by the company." Since Pelullo had just testified that the February wire transfer went to pay off an intercompany debt, it is overly formalistic to require that he reiterate that point a few questions later in predetermined language. In sum, the District Court clearly erred on this set of findings, but this does not render its overall conclusion clearly erroneous.

The District Court found similar problems with Pelullo's testimony about Leonetti. While acknowledging that Pelullo
denied meeting Leonetti, the Court noted that Pelullo admitted that he had been to Scarfo's house on two occasions, and that he did not deny that these visits had occurred in January 1986. The Court then faulted Pelullo for failing to deny that "he met with Mr. Scarfo and Mr. Leonetti on either or both of those occasions." *See id.* at 416. But Pelullo had already testified, when asked if Leonetti ever contacted him about the DiSalvo loan, that Leonetti never had contacted him. Perhaps his lawyer should have made sure to ask Pelullo whether he visited Scarfo's house in January; it appears that Pelullo did not deny that his visits to Scarfo's house were in January because he was never asked when those visits occurred. The District Court declared, "It is inconceivable to me under these circumstances that Mr. Pelullo would have given up his constitutional privilege only for the purpose of providing such vague and ambiguous testimony." *See id.* While it would be unfair to require Pelullo to lay out his defense in specific words, we do not think the District Court erred in inferring that Pelullo would have set forth a clearer defense if he truly had decided to testify solely to rebut the government's case on Count 54.

6. Testimony in the Second Trial

At his second trial, Pelullo again testified in his own

defense, setting out his entitlement theory much as he had in the first trial. The District Court found that the only significant difference between his testimony at the two trials was that he did not testify about the $114,000 in the second trial. The Court found that this was "powerful and compelling evidence that his reason for waiving his fifth amendment privilege and testifying at the first trial had nothing to do with the information contained in the *Brady* material, because the information contained in the *Brady* material was relevant only to the $114,000 transaction with Mr. DiSalvo and was not relevant to the other counts about which Mr. Pelullo freely testified." *See id.* at 413.

Pelullo correctly points out that the District Court had (erroneously) ruled at the beginning of the second trial that the jury would be instructed that it had to find as a matter of law that Pelullo had committed the acts set forth in Count 54. Pelullo argues that he had no choice but to take the stand in an attempt to mitigate the explosive impact of that error, though he fails to explain precisely why he felt that taking the stand to discuss Counts 1-53 would mitigate the error. Thus, he would have us conclude, the trial was so fraught with error that it cannot be used as evidence of anything.

However, with regard to trial two, either of two assumptions could be correct. While it might be true that Pelullo had to get on the stand in order to combat the District Court's erroneous use of collateral estoppel, it also could be true that taking the stand

when Count 54 was not in issue indicates that the role of Pelullo's testimony in his own defense encompassed more than just a response to Count 54. Since either inference is viable, we discern no clear error in the District Court's finding.

7. Pelullo's Other Evidence in Defense Against Count 54

The District Court found that Pelullo had a significant amount of evidence that he could use in mounting a defense to Count 54. This evidence included his father's testimony that Royale owed his company money for the hotel renovation project; that the $114,000 transfer in February was partial payment of that debt; that he used the $114,000 for personal reasons; and that he did not use the money to repay DiSalvo on his son's behalf. *See id.* at 411.

Beyond refuting the accusations against Pelullo, Pelullo's family offered an affirmative explanation for the events at issue. *See id.* His father testified that in August 1986, Leonard's brother Arthur told him that Leonard had borrowed money from DiSalvo and that Scarfo and Leonetti had advised the Pelullos to repay DiSalvo. Leonard's brother Peter testified that he helped Leonard repay DiSalvo by borrowing money from a bank in September 1986; Peter stated that he then gave that money to Arthur to give DiSalvo. Leonard introduced bank documents supporting this story, including a $55,000 bank check drawn on his

brother's account, made payable to DiSalvo. The District Court did not clearly err in concluding that, based on this evidence list, Pelullo could have mounted a defense to Count 54 without taking the stand himself. The Court also found that Pelullo had a number of ways to impeach Leonetti's testimony, only one of which was taking the stand. As we noted in *Pelullo II*, "Leonetti was subject to extensive cross-examination and impeachment. The defense attacked Leonetti's credibility by bringing to light the accounts of his murders and his desperate deals with the government in order to get out of prison sooner." *Pelullo II*, 14 F.3d at 887. The District Court also found that Pelullo, in a motion after the second trial, had described Leonetti's trial testimony as having "minuscule relevance." *See* 6 F. Supp. 2d at 420. From that language, the District Court inferred that Leonetti's testimony had little effect on Pelullo's decision to waive his Fifth Amendment rights. While an alternate reading--that Pelullo simply was downplaying to the court the significance of an adverse witness's testimony--is possible, the District Court's reading is plausible too.

In sum, based on the whole of the District Court's findings of fact, we cannot say that the District Court clearly erred when it found that the government proved by a preponderance of the evidence that Pelullo would have testified during his first trial even if the withheld material had been made available to him. While the District Court's findings of fact were not

uniformly correct, we are not left with a "definite and firm conviction that a mistake has been committed." *See United States Gypsum*, 333 U.S. at 395.

The judgment of the District Court will be affirmed. However, upon return of the mandate to the District Court, the Court shall amend the judgment to reflect that the fine is a non-committed fine.

A True Copy:
Teste:

Clerk of the United States Court of Appeals
for the Third Circuit

IN THE UNITED STATES COURT OF APPEALS
FOR THE THIRD CIRCUIT

NO. 98-1527

UNITED STATES
v.
LEONARD A. PELULLO,
Appellant
(D.C. Crim. No. 91-cr-00060)

Present: BECKER, Chief Judge, SLOVITER, STAPELTON, MANSMANN, GREENBERG, SCIRICA,NYGAARD, ALITO, ROTH, LEWIS, McKEE, RENDELL, and ROSENN,* Circuit Judges.

SUR PETITION FOR PANEL REHEARING
WITH SUGGESTION FOR REHEARING *EN BANC*

The petition for rehearing filed by Appellant having been submitted to the judges who participated in the decision of this Court, and to all the other available circuit judges in active service, and no judge who concurred in the decision having asked for rehearing, and a majority of the circuit judges of the circuit in regular active service not having voted for rehearing by the court *en banc*, the petition for rehearing is DENIED.

*As to panel rehearing only.

BY THE COURT:

/s/

Chief Judge

DATED: APR 30, 1999

DR/CC: RAR
RGC
FAC

UNITED STATES of America
v.
Leonard A. PELULLO.

No. Crim. 91-00060.

United States District Court,
E.D. Pennsylvania.

June 9, 1998.

FINDINGS OF FACT AND CONCLUSIONS OF LAW RE: THE REMAND HEARING

ROBERT F. KELLY, District Judge.

On January 9, 1997, the United States Court of Appeals for the Third Circuit remanded this matter for the purpose of conducting an evidentiary hearing with regard to Defendant Leonard A. Pelullo's motion for a new trial.[1] [2]. Specifically, the court stated, "On remand, the government should be afforded an

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[1] *U.S. v. Pelullo*, 105 F.3d 117 (1997). A hearing was conducted on January 23, 1998.

[2] The court continued the remand hearing until January 23, 1998 at Mr. Pelullo's request due to the pendency of a separate criminal trial. *See United States v. Pelullo*, 961 F.Supp. 736 (D.N.J.1997).

opportunity to demonstrate, consistent with its burden of proof, that Pelullo would have testified during his first trial even if the withheld material had been turned over." The court did not state what standard of proof applied to the government's burden. That then, is the first issue for this Court to decide.

STANDARD OF PROOF

In similar cases, the Supreme Court has consistently held that the preponderance standard applies when the government has the burden of showing that evidence is not tainted by a constitutional violation, and therefore is not subject to suppression under the exclusionary rule. *See Lego v. Twomey*, 404 U.S. 477, 488-89, 92 S.Ct. 619, 30 L.Ed.2d 618 (1972); *U.S. v. Matlock*, 415 U.S. 164, 177 n. 14, 94 S.Ct. 988, 39 L.Ed.2d 242 (1974); *Nix v. Williams*, 467 U.S. 431, 444 n. 5, 104 S.Ct. 2501, 81 L.Ed.2d 377 (1984); *Colorado v. Connelly*, 479 U.S. 157, 168, 107 S.Ct. 515, 93 L.Ed.2d 473 (1986).

In Lego, the defendant contended the police coerced his confession. The trial court admitted the confession, finding the state had proved the confession was voluntary by a preponderance of the evidence. The defendant challenged this finding contending that the standard was beyond a reasonable doubt. In upholding the trial court, the Supreme Court held,

To reiterate what we said in *Jackson*:

> When a confession challenged as involuntary is sought to be used against a criminal defendant in his trial, he is entitled to a reliable and clear-cut determination that the confession was in fact voluntarily rendered. Thus the prosecution must prove that at least by a preponderance of the evidence that the confession was voluntary.

Id. 404 U.S. at 488-89, 92 S.Ct. 619 (citations omitted).

In *Matlock*, where the Supreme Court remanded the case for an evidentiary hearing on the issue whether the evidence was sufficient to establish consent to search, the court noted that the district court had correctly applied the preponderance standard at the suppression hearing:

> [T]he controlling burden of proof at suppression hearings should impose no greater burden than proof by a preponderance of the evidence. *See Lego v. Twomey*, 404 U.S. 477, 488-89, 92 S.Ct. 619, 30 L.Ed.2d 618 (1972).

United States v. Matlock, 415 U.S. at 178 n. 14, 94 S.Ct. 988.

In *Nix v. Williams*, the police obtained a statement

from a murder suspect, in violation of his sixth amendment right to counsel, identifying the location of the victim's body. The Supreme Court reversed the defendant's initial conviction because the state admitted the statement into evidence. On retrial, the state introduced evidence of the condition of the victim's body, which the police found using the defendant's statement. The defendant contended that evidence of the victim's body should have been suppressed as "poisonous fruit" of the sixth amendment violation. The Supreme Court disagreed, holding that the state's evidence established by a preponderance of the evidence that the police would have inevitably discovered the body without the defendant's statement and therefore, application of the exclusionary rule was not warranted. *See Nix v. Williams*, 467 U.S. at 448-50, 104 S.Ct. 2501. In *United States v. Wade*, 388 U.S. 218, 87 S.Ct. 1926, 18 L.Ed.2d 1149 (1967), the Supreme Court held that a pretrial line-up violated the defendant's sixth amendment right, but remanded the case for a hearing to give the government the opportunity to establish that the illegal identification did not taint the later in-court identification. Justice Brennan stated that the clear and convincing standard would apply in the suppression hearing on remand, but did so without analysis of the issue. *See id.* at 240, 87 S.Ct. 1926. Justice Brennan's decision in *Wade* preceded the cases cited above in which the Supreme Court did analyze the standard of proof issue. The Supreme Court has expressly declined to follow Justice Brennan's view

that the clear and convincing standard should apply in other suppression contexts. *See Lego v. Twomey*, 404 U.S. at 492, 92 S.Ct. 619 (J. Brennan, dissenting); *Nix v. Williams*, 467 U.S. at 459, 104 S.Ct. 2501; *Colorado v. Connelly*, 479 U.S. at 185-86, 107 S.Ct. 515. The Supreme Court subsequently limited *Wade* to line-up cases. *See Nix v. Williams*, 467 U.S. at 444 n. 5, 457 n. 8, 104 S.Ct. 2501 (J. Stevens, concurring) (1984). In limiting *Wade*, the court reasoned that a higher standard of proof was appropriate in a suppression hearing involving an illegal line-up because a constitutional defect in a pretrial identification could cast doubt on the reliability of the subsequent in-court identification. Here, there is no contention that Mr. Pelullo's in- court testimony was rendered unreliable by the *Brady* violation.

After reviewing the above cases together with the briefs submitted by Mr. Pelullo's counsel, I am convinced that the government is required to prove by a preponderance of the evidence that Leonard Pelullo would have testified at the first trial even if the *Brady* material had been supplied to him. I now make these following findings of fact and conclusions of law:

FINDINGS OF FACT

1. On July 3, 1991, a jury convicted Mr. Pelullo of 49 counts of mail fraud and one count of racketeering (Count 55). (For the purpose of these findings, the

1991 trial will be referred to as the "first trial.") On appeal, the Third Circuit vacated 48 of the 49 wire fraud counts and Count 55. The Third Circuit affirmed one wire fraud count, Count 54.

2. Count 54 charged Mr. Pelullo with conducting a fraudulent scheme involving the diversion of $114,000 in funds belonging to Palm Beach Heights & Development Corporation ("PBH"), a wholly owned subsidiary of the Royale Group Limited Corporation ("Royale"). The indictment charged that in February 1986, Mr. Pelullo used these corporate funds to repay a personal debt Mr. Pelullo owed to Anthony DiSalvo, a loanshark associated with the Philadelphia mafia. Racketeering Act ("RA") 60 of Count 55 charged this same scheme as a predicate act of Mr. Pelullo's racketeering activity.

3. At a second trial, on January 29, 1993, a jury convicted Mr. Pelullo of 49 wire fraud counts and one RICO count. On January 24, 1994, the Third Circuit of Appeals reversed that conviction on all counts. In October 1994, Mr. Pelullo was tried for a third time. That trial ended when the jury was unable to reach a verdict. Following a retrial in January 1995, the jury again convicted Mr. Pelullo of 46 counts of wire fraud and Count 55. (For the purpose of these findings, the 1995 trial will be referred to as the "1995 retrial")

4. On appeal of the 1995 retrial, Mr. Pelullo challenged both the original conviction on Count 54

and the convictions on the other counts from the 1995 retrial. The Third Circuit vacated Mr. Pelullo's conviction on Count 54 on the ground that the government had failed to produce evidence constituting *Brady* material which Mr. Pelullo could have used to impeach government witnesses regarding Count 54 at the first trial. *See United States v. Pelullo*, 105 F.3d 117 (1997). These items consisted of: (i) rough notes of a June 14, 1990 interview of Mr. Pelullo written by FBI Special Agent Randall Wolverton during which Mr. Pelullo discussed the $114,000 transaction; (ii) a memorandum of an interview of Phillip Leonetti, the former underboss of the Philadelphia mafia, by an IRS agent and the agent's rough notes of the interview; and (iii) FBI surveillance logs of the Florida residence of Nicodemo Scarfo, the former boss of the Philadelphia mafia.

5. Mr. Pelullo obtained the *Brady* material before the 1995 retrial. Thus, the *Brady* convictions found by the Third Circuit with respect to the first trial did not require reversal of the convictions from the 1995 retrial. However, Mr. Pelullo asserted that the *Brady* violation tainted his convictions from the 1995 retrial because the government used a portion of his testimony from the first trial at the 1995 retrial. As the Third Circuit noted, Mr. Pelullo contended the court should have suppressed his testimony from the first trial because:

> [H]e was forced to take the stand at the

> first trial due solely to the government's failure to abide by its obligation under *Brady*. In other words, Mr. Pelullo argues that because he had no other way to impeach the government witness (sic) he was compelled to take the stand himself and rebut their testimony.

Id., at 124.

6. The Third Circuit agreed that Mr. Pelullo's testimony from the first trial would be subject to suppression if the district court determined on remand that it was the "inadmissible fruit of a poisonous tree" of the *Brady* violation. *Id.* at 125. The Third Circuit remanded for an evidentiary hearing to give the government the opportunity to establish "whether Mr. Pelullo would have testified in the first trial anyway even if the government had complied with its *Brady* obligations." *Id.* at 125. The Third Circuit identified the relevant portion of Mr. Pelullo's testimony from the first trial as follows:

> Q: So, there was a debt to Tony DiSalvo?
> A: Yes.
> Q: And that debt was repaid?
> A: Yes.
> Q: When was it repaid?
> A: Well, it was paid, my brother gave me $55,000 in September and he has the cashier's check. I think I gave it to you and then my dad gave me a $180,000 out

of the closing on the restaurant and his property and that was $230,000, then I gave Pete $20,000. It must have been some time in '87 that we paid it off. Okay, now and Pete gave the money to, I guess it ended up with DiSalvo.

Q: Okay, we've heard testimony from a man named Leonetti about the use of the Mafia to collect on this loan.

First of all, did you ever have any contact with Mr. Leonetti?

A: I have knowledge of who Mr. Leonetti is. I grew up in South Philadelphia. I know these people from seeing them on the street and maybe running into them at a restaurant. Do I know them? Do I associate with them? No.

Q: Okay. Did he contact you about this loan?

A: Never.

Q: Did he contact your family?

A: Yes, what happened was my brother has a business in South Philadelphia, he had a recording company at 20th and Wyomissing. Most of these people are from that area and they walked into Pete and told him that hey had been assigned to collect the loan and Pete got in touch with me and said we have a problem and that's how it came about.

Q: Okay, did you have any concern for

your family at that point?
A: Absolutely, they are dangerous people.
Q: And what was the time period again that the loan was repaid, September of '86, August and them '87, sometime in January?
A: Okay, I think it was about that time.
Q: Do you know a man named Nicodemo Scarfo?
A: I know who he is. I know him from South Philadelphia. I could have run into him at a restaurant, I know who he is. Do I?
Q: Do you?
A: Associate with him, no.
Q: Did you have any conversations with him about this loan?
A: Never.
Q: Okay, have you ever been to his home?
A: Yes.
Q: How did that come about?
A: What happened was, I was in Miami and a man by the name of Sam LaRusso. Sam had worked for my father about 30 years ago as a laborer. And he told me he had a job in Fort Lauderdale, would I come up and help him? I said sure, Sam, I'll be up to see it.
I went up to Fort Lauderdale and when I get there he tells me where I'm at. I didn't know it was Scarfo's house. And he said

Leonard, he said, I need some help here. There's a construction job. I don't have any people here and I need to get a permit. I said, Sam, I don't want to get involved. Don't put me in this position. And I wasn't threatened, but the situation with Sam was that Sam was a prisoner, basically, until this work was done and he asked me to get him a permit, get him some contractors to get the work done, otherwise he was going to have a problem with these people. And I looked at the job, I sent Keith Swenson there and I said see what you can do about getting him a permit and get him some plans and get the job done and let's get the hell out of here. That's what I told him.

Q: Is that the only time you were ever at his house?

A: I might have been there twice with Sam, because he needed some technical help on how to do something and I tried to limit my exposure there, yes.

United States v. Pelullo, 105 F.3d at 120-21.

7. As noted, the Third Circuit found that the government's failure to disclose rough notes taken by Agent Wolverton during a June 14, 1990 interview with Mr. Pelullo constituted a *Brady* violation. The facts regarding this interview are relevant to the

analysis of the remand issue.

8. During the investigation leading up to his indictment, Mr. Pelullo requested a meeting with the prosecutor and Agent Wolverton. As Mr. Pelullo stated, he wanted "to speak to them and try and straighten this out." GX 12 at 196. Mr. Pelullo was accompanied by his attorney, Fred Schwartz. According to the testimony of Agent Wolverton, and FBI Agent Michael Leyden, during this interview Mr. Pelullo stated that he had used the $114,000 in funds belonging to PBH to repay his personal loan to DiSalvo. At the first trial, Mr. Pelullo denied making this statement. –

9. On January 23, 1998, the Court conducted an evidentiary hearing to give the government the opportunity to establish that Mr. Pelullo's testimony from the first trial was not inadmissible "fruit of the poisonous tree." At the hearing, the government offered evidence consisting primarily of excerpts of the testimony from the first trial and statements of Mr. Pelullo from other proceedings, for the purpose of showing that Mr. Pelullo would have testified at the first trial even if the *Brady* material had been produced.

Although Mr. Pelullo had no burden to produce any evidence, Mr. Pelullo offered the testimony of Glenn Whitaker, one of his attorneys from the First trial, to support his contention that he was compelled to testify

at the first trial. On direct, Mr. Whitaker explained the reason Mr. Pelullo testified at the first trial as follows:

> Q: Mr. Whitaker, were you involved in the decision to have Mr. Pelullo testify at the first trial?
> A: I was.
> Q: What were the determining factors in that decision to have him testify?
> A: Well, primarily that we had two F.B.I. agents testifying abut a meeting at which Mr. Pelullo was present, and their testimony needed to be rebutted about a particular reference that's contained in this 302....
> Q: Is that the reference that is at Page JA-774, the last four lines?
> A: Yes. The reference is that a $114,000 wire transfer from the debtor-in-possession account to LRP, Inc., was used to repay Tony DiSalvo. We felt it essential that we call Mr. Pelullo to respond to that, because, quite frankly, there was no other way to deal with that issue.
> In addition, we felt that we were required to respond to the testimony of Mr. Leonetti about his contacts with Mr. Pelullo, and, again, there was no one else available to deal with that, and there was

> no effective cross-examination material to deal with those witnesses.

TR. at 17-18.[3]

11. On cross-examination, Mr. Whitaker testified that, with respect to Agent Wolverton's rough notes of the June 14, 1990 interview, Mr. Pelullo specifically waived his fifth amendment privilege so that he could testify about what Mr. Pelullo claimed he told the agents about the $114,000 transaction during the June 14, 1990 interview:

> Q: And you're saying that instead of having those [rough] notes, you put Leonard Pelullo on the stand to say that he told the agents something different, is that correct?
> A: In part, that's one of the reasons. (....)
>
> ....
>
> Q: No. I'm not focusing on that yet. I'm simply saying, with respect to Wolverton and Leyden's direct testimony, you put Pelullo on to deny that he made the statement that they attributed to him about the $114,000 in the 302?
> A: In part, he was put on the stand to

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[3] The notation "Tr." refers to the transcript of the remand hearing held on January 23, 1998.

> deny that the statement that's contained in the 302, which I believe was the subject of testimony by Mr. Wolverton, was made.

Tr. at 40.

12. With respect to the testimony of government witness Phillip Leonetti, Mr. Whitaker testified on cross-examination that Mr. Pelullo waived his fifth amendment privilege so that Mr. Pelullo could contradict Leonetti's testimony that he had contact with Pelullo:

> Q: Okay. And so you're saying he took the stand solely to contradict Leonetti about the contact the two of them had?
> A: You keep using the word "solely," and that's not correct.
> Q: Well, solely with respect to Leonetti's testimony?
> A: With respect to Leonetti's testimony, he took the stand to contradict that he had a contact with Leonetti.

Tr. at 55-56.

13. Mr. Whitaker testified on cross-examination that Mr. Pelullo's decision to waive his fifth amendment privilege at the first trial was based only on the government's evidence pertaining to Count 54, and that the government's proof pertaining to the other 53

wire fraud counts did not influence Mr. Pelullo's decision to testify:

> Q: And are you saying that offering a defense to those other 53 counts did not factor in your decision to put Leonard Pelullo on the stand?
> A: Not really.
> Q: No what? Not really what?
> A: It did not. I felt we had adequate defenses and adequate presentation as to the other counts. Count 54 was the one I was most concerned about.

Tr. at 61.

14. Mr. Whitaker acknowledged that before Mr. Pelullo took the stand at the first trial, Mr. Pelullo and Mr. Whitaker were aware that government witness Keith Swenson could testify that he had seen Mr. Pelullo at Mr. Scarfo's house in Florida:

> Q: And you knew, didn't you, before he took the stand, and Leonard Pelullo knew, that Keith Swenson has been to Scarfo's house because Leonard Pelullo had sent him there and had seen Leonard Pelullo at Scarfo's house?
> A: I believe that's the case.

Tr. at 63.

15. In sum, Mr. Whitaker testified specifically that Mr. Pelullo's only reason for waiving his fifth amendment privilege was to defend against Count 54, and the corresponding RA 60, by testifying that: (a) Mr. Pelullo did not admit to Agents Wolverton and Leyden that he used the $114,000 to repay Mr. DiSalvo; (b) to the contrary, Mr. Pelullo told the agents that he used the $114,000 to pay an "intercompany debt"; and (c) he did not have contact with Mr. Leonetti and Mr. Scarfo at Mr. Scarfo's house in Fort Lauderdale, Florida in January of 1986 concerning the DiSalvo loan.

16. At the first trial, Mr. Pelullo faced an indictment charging him with 55 separate criminal counts: 54 counts of wire fraud and 1 racketeering count. Each separate wire fraud count exposed Mr. Pelullo to a five year sentence of imprisonment.

17. These multiple counts comprised three separate fraudulent schemes conducted by Mr. Pelullo. See Indictment. The first scheme, charged in Counts 1 through 53 and the corresponding RA 1 through 59, alleged Mr. Pelullo fraudulently diverted to his personal benefit $1.6 million in loan proceeds advanced to Royale, a public corporation controlled by Mr. Pelullo, by American Savings & Loan Association ("American"). The second scheme, charged in RA 61 through 72, involved Mr. Pelullo's diversion of an additional $471,000 of Royale corporate funds to his personal benefit. The third Fraudulent scheme,

charged in Count 54 and RA 60, involved Mr. Pelullo's diversion of the $114,000 of PBH corporate funds to repay his personal debt to Mr. DiSalvo.

18. The first trial began on June 17, 1991 and ended on July 3, 1991. The government presented approximately 30 witnesses to prove Mr. Pelullo's two schemes to defraud Royale and American by diverting loan proceeds advanced to Royale to his personal benefit. The government called former Pelullo employees (Rubin, Swenson, McDonald, Comegys, Williams, Hellhake, Bershtein, Feldman) and several of Royale's outside accountants to establish the schemes. The government also called several witnesses to establish how Mr. Pelullo diverted over $2 million in Royale corporate funds to his personal benefit. Two employees from American testified as to the draw request process through which Mr. Pelullo falsely overstated the construction costs to claim loan proceeds from American. In support of these witnesses, the government also introduced voluminous documentary evidence. The following is a summary of the government's proof at the first trial:

(A) Mr. Pelullo was the chief executive officer of Royale, a public corporation engaged in real estate development. Royale was in precarious financial condition. From 1983 to early 1986, Mr. Pelullo exercised complete control over Royale and its board of directors.

(B) In 1983, Royale acquired six hotels in Florida (the "art deco hotels"). In June 1984, Royale obtained a loan with American for $13.5 million to finance the acquisition and renovation of the art deco hotels. American retained $3.7 million of the loan to pay for the renovation costs and disbursed these funds only after Royale submitted certified draw requests containing an itemization of costs incurred by Royale. Under the terms of the loan, Royale had to incur the costs before requesting payment. The loan was increased twice and by the end of 1985, Royale had requested and received approximately $6.2 million through draw requests.

(C) Without prior approval from the Royale board or competitive bidding, Mr. Pelullo arranged for Delta Development & Construction Corp. ("Delta"), a company he controlled, to do the renovation work on the art deco hotels. By virtue of his control over Royale and its board, the willful circumvention of standard corporate procedures, and the use of Delta, Mr. Pelullo was able to conduct two fraudulent schemes whose objects were to divert Royale corporate funds for his personal use.

(D) In the draw request Mr. Pelullo submitted between July 1984 and November 1985 to obtain renovation loan proceeds, he overstated renovation costs by at least $3 million. Not only did Mr. Pelullo submit false requests, he submitted false invoices and related documents to support the draws. American

relied on the draw request and supporting documents to disburse loan proceeds.

(E) To conceal his schemes, Mr. Pelullo stopped maintaining accounting records for Royale and instructed American to disburse loan proceeds directly to Delta checking accounts, thus completely circumventing any accounting of the loan funds by Royale's public auditors and shareholders.

(F) After American wired loan proceeds to Delta's accounts, they were disbursed only at Mr. Pelullo's directions. The government's evidence showed how Mr. Pelullo used Royale's loan proceeds to finance his private business projects in Philadelphia and his horse farm in Chester County, Pennsylvania. Mr. Pelullo also used Royale's loan proceeds for personal expenses, such as: buying real estate in Chester County, Pennsylvania; buying a ranch in Montana; repaying a loan his father owed to a Philadelphia bank; and repaying Mr. Pelullo's gambling debt to an Atlantic City casino. Mr. Pelullo also arranged for his brother, Arthur, to deliver $100,000 of Royale loan proceeds in cash to Mr. Pelullo at a casino in Puerto Rico.

19. The evidence as to the third scheme showed that Mr. Pelullo had a loan from a loanshark named Mr. DiSalvo. When Mr. Pelullo failed to repay the loan, Mr. DiSalvo sought the assistance of Philip Leonetti, a member of the Philadelphia mafia. Mr. Leonetti agreed to help collect the debt in exchange for half the

amount collected. In late 1985 or early 1986, Mr. Leonetti and his uncle, Nicodemo Scarfo, who was the boss of the Philadelphia mafia, met with Mr. Pelullo and advised him to repay Mr. DiSalvo. As a result, Mr. Pelullo instructed a Royale employee to wire transfer $114,000 out of a PBH bank account to a Pelullo-family corporation in Philadelphia on February 25, 1986, where it was converted to cash and delivered to Mr. DiSalvo.

20. During a sidebar conference, the government proffered the testimony of Mr. Swenson, a former employee of Mr. Pelullo, regarding his trips to Mr. Scarfo's Florida residence as relevant proof of Mr. Pelullo's association with Mr. Scarfo and Mr. Leonetti. See GX 17. However, the court ruled that this testimony was not admissible in the government's case-in-chief.

21. On July 1, 1991, Mr. Pelullo testified on direct in his own defense. The transcript of his direct testimony begins on page 80, and concludes on page 203. This excerpt of the transcript contains approximately 7 pages of sidebar discussions, which results in a net total of 116 pages of testimony. (GX 12). Of the total testimony, six (6) of the 116 pages (194-200) were devoted to the subject of the $114,000 transaction. The other testimony (over 110 pages) pertained to matters relating to the government's proof of the other two schemes to defraud Royale of over $2 million in loan proceeds and is completely unrelated to Count

54/RA 60. In sum, the vast majority of Mr. Pelullo's testimony was dedicated to providing a defense to the heart of the government's case, namely the two fraudulent schemes charging Mr. Pelullo with defrauding American and Royale of over $2 million. In substance, Mr. Pelullo asserted he was entitled to the loan proceeds which the government contended he had fraudulently diverted to his own use.

22. In his direct testimony, Mr. Pelullo discussed at length: (a) his role in financing Royale; (b) the background of the art deco loan; (c) various problems with the construction process; (d) the bank inspection process; and (e) his contention that he was entitled to disburse funds of a public corporation to himself.

23. At the conclusion of his testimony, Mr. Pelullo stated:

> Q: Now with respect to money that was paid over to Delta pursuant (sic) to this loan, did Delta provide value for all the money which it received from the loan?
> A: Delta earned every dime that we put into that job and we gave up a lot of consideration in doing that job. And we gave full value for that job. Even the bank commented that they couldn't believe we were getting it done for the prices we were doing it for.
> Q: Did you ever take money from Royale

to which you were not entitled?
A: Absolutely not.

24. Mr. Pelullo also testified that, contrary to the government's proof, he had not used the $114,000 to repay Mr. DiSalvo. However, Mr. Pelullo also introduced other evidence, separate and apart form his own testimony, to establish his contention that the $114,000 was not used to repay Mr. DiSalvo. Mr. Pelullo's father, Peter Pelullo, testified for the defense that: (a) Royale owed him money for the hotel renovation project and the $114,000 wire transfer to LRP was a partial payment of the money owed to him; (b) he used the $114,000 for personal reasons; and (c) he did not use it to repay Mr. DiSalvo. GX 18.

25. Peter Pelullo also testified that in August of 1986, his son, Arthur Pelullo, informed him that Leonard Pelullo had borrowed money from Mr. DiSalvo and that Mr. Scarfo and Mr. Leonetti had advised the Pelullo family to repay Mr. DiSalvo. Peter Pelullo testified he assisted Mr. Pelullo in repaying Mr. DiSalvo by borrowing money from a bank in September of 1986, which he gave to another son, Peter, to repay the money that Mr. Pelullo owed to Mr. DiSalvo. Mr. Pelullo introduced bank documents supporting this version. Leonard Pelullo's two brothers, Arthur and Peter, did not testify for the defense. However, they were available to testify on behalf of Mr. Pelullo. (Tr. at 56- 59; GX 18). Mr. Pelullo also had a copy of a $55,000 bank check drawn

on his brother's account and made payable to Mr. DiSalvo which Mr. Pelullo contended was used to repay his debt to Mr. DiSalvo. GX 19.

26. As noted, the Third Circuit vacated all counts of conviction from the First trial, except for Count 54. A second trial was conducted in January 1993 (the "second trial"). However, because the Third Circuit had affirmed Count 54, this Court granted the government's pretrial motion for a ruling that under the doctrine of collateral estoppel, the wire fraud offense charged in RA 60 was established by Mr. Pelullo's conviction on Count 54. Thus, whether Mr. Pelullo had committed the fraudulent scheme involving the diversion of $114.000 in PBH funds to repay Mr. DiSalvo was not at issue in the second trial. (The government was still required to prove that this offense was part of the pattern of racketeering activity charged in Count 55).

27. On January 25, 1993, Mr. Pelullo testified in his own defense at the second trial. The transcript of Mr. Pelullo's direct testimony begins on page 146 and concludes on page 202. This excerpt of the transcript contains 56 pages. Mr. Pelullo again testified about his "entitlement" defense to his personal use of the Royale funds in essentially the same manner he had during the first trial. In his direct, Mr. Pelullo also discussed: (a) his role in financing Royale; (b) his justification for disbursing art deco loan proceeds to his personal benefit; (c) how he computed the costs

submitted to American in the draw process; (d) his explanation for various items that the government had established were fraudulent; (e) his explanation for why two international accounting firms were unable to complete their audit; and (f) his efforts to buy a casino in Puerto Rico for Royale. The only significant difference between Mr. Pelullo's testimony during the first trial and his testimony during the second trial was that Mr. Pelullo did not testify about the $114,000.

28. I have reviewed the record from the first trial and read in its entirety the direct and cross-examination of Mr. Pelullo in that trial. I have read in its entirety Mr. Pelullo's testimony at his second trial. I have compared Mr. Pelullo's first trial testimony and Mr. Whitaker's closing argument with Mr. Whitaker's testimony as to the reasons why Mr. Pelullo testified at the first trial.

29. I find that the government has established by clear and convincing evidence that Mr. Pelullo waived his fifth amendment privilege and voluntarily agreed to testify at the first trial so that Mr. Pelullo could present a defense to the jury by explaining that he was entitled to use the Royale corporate funds in the manner that he did, and therefore, he did not commit fraud as charged in the indictment. I further find that the *Brady* material does not and cannot establish or even support the "entitlement" defense Mr. Pelullo sought to establish through his direct testimony. I

find that the *Brady* material is irrelevant to the "entitlement" defense Mr. Pelullo advanced through his direct testimony at the first trial. As the Third Circuit has held: "the withheld evidence clearly could have been utilized by the defense during the first trial to undermine the government's case on Count 54 by way of impeaching the testimony of three government witnesses: Mr. Leonetti, Mr. Wolverton and Mr. Kurtz (sic)." *Id.* 105 F.3d at 122. Because the *Brady* material would not have supported Mr. Pelullo's "entitlement" defense, having the *Brady* material available at the first trial would not have changed Mr. Pelullo's decision to testify.

30. The best evidence of Mr. Pelullo's reason for waiving his fifth amendment privilege is the substance of what Mr. Pelullo actually testified about after waiving the privilege. The record of the first trial establishes that the overwhelming majority of Mr. Pelullo's testimony was dedicated to Mr. Pelullo's explanation as to why he was entitled to use the Royale loan proceeds for his personal benefit.

[2] 31. The government's evidence with respect to Counts 1 through 53, the fraudulent scheme involving Mr. Pelullo's diversion of the $1.6 million dollars in loan proceeds advanced to Royale for the art deco hotels, was strong. As noted, the government called [30] witnesses and presented over 100 exhibits in support of the proof of this scheme. Mr. Pelullo's ability to control Royale, Delta and their respective

bank accounts was clearly established. Mr. Pelullo could not dispute the overwhelming evidence showing that Mr. Pelullo disbursed $1.6 million in loan proceeds advanced to Royale for the art deco hotels project and $471,000 in working capital to his private companies and personal bank accounts. The government presented clear evidence that Mr. Pelullo had caused American to disburse the loan proceeds to Royale through false representations regarding the construction costs incurred for the art deco hotels. The government's evidence clearly established that Mr. Pelullo had intentionally disregarded standard corporate practices and "stonewalled" Royale's public accountants to conceal his diversion of corporate funds. The inference of Mr. Pelullo's intent to defraud was obvious. Absent an explanation justifying Mr. Pelullo's diversion of corporate funds to his personal benefit, the jury would have had no difficulty in returning guilty verdicts on Counts 1 through 53. In short, the government's evidence was compelling. This evidence may have compelled Mr. Pelullo to take the stand at the first trial. However, such compulsion did not violate any right, constitutional or otherwise, of Mr. Pelullo. As the Third Circuit has held, the *Brady* material may have been useful to Mr. Pelullo with respect to the impeachment of the government witnesses regarding Count 54, but it would not have deterred Mr. Pelullo from testifying about his "entitlement" defenses. Accordingly, I have found that the government has established by clear and convincing evidence that Mr. Pelullo's testimony at the

first trial was obtained by means sufficiently distinguishable from the *Brady* violation to be purged of any taint arising from that violation. *See Harrison v. United States*, 392 U.S. 219, 226, 88 S.Ct. 2008, 20 L.Ed.2d 1047 (1968).

32. I find that the government has established by clear and convincing evidence that Mr. Pelullo would have specifically testified during the first trial that he was present at Mr. Scarfo's Florida residence even if the *Brady* material had been disclosed. I have found that Mr. Pelullo waived his fifth amendment privilege and testified at the first trial to put forth his so- called "entitlement" defense to all counts of the indictment. However, having elected to waive his fifth amendment privilege to testify about his "entitlement" defense, Mr. Pelullo could reasonably anticipate that he would be subject to cross-examination about his contacts with Mr. Leonetti and Mr. Scarfo. Mr. Whitaker testified at the remand hearing that Mr. Pelullo acknowledged that he was in fact present at Mr. Scarfo's Florida residence. (Tr. at 64). Thus, Mr. Pelullo could not have denied being present at Mr. Scarfo's house if confronted about this matter on cross-examination, but would have had to acknowledge being at Mr. Scarfo's Florida residence. Tactically, this admission would have less impact if disclosed on direct. Moreover, Mr. Pelullo could accompany his admission with his alleged innocent explanation for his visits to Mr. Scarfo's Florida residence. A far worse scenario would have transpired if Mr. Pelullo had falsely denied being

present at Mr. Scarfo's Florida residence: the government could have impeached this denial by calling Mr. Swenson as a rebuttal witness. In Sum, once Mr. Pelullo waived his fifth amendment privilege to testify about his "entitlement" defense to all counts of the indictment, it was inevitable that the truth about his visits to Mr. Scarfo's house would come out. Accordingly, the government has demonstrated by clear and convincing evidence that Mr. Pelullo's specific testimony about his trips to Mr. Scarfo's house in Florida that the government introduced at the 1995 retrial was obtained by means sufficiently distinguishable from the *Brady* violation to be purged of any taint arising from that violation. *Harrison*, 392 U.S. at 226, 88 S.Ct. 2008.

33. This Court's conclusion that Mr. Pelullo would have testified in the manner that he did at the first trial even if the *Brady* material had been disclosed is bolstered by the fact that Mr. Pelullo testified at the second trial, even though the $114,000 transaction with Mr. DiSalvo charged in Count 54 was not an issue for the jury to decide. At the second trial, Mr. Pelullo once again waived his fifth amendment privilege and testified at length regarding his "entitlement" defense to the two other fraudulent schemes. Mr. Pelullo did not testify about the $114,000 transaction at the second trial. Mr. Pelullo's conduct at the second trial is powerful and compelling evidence that his reason for waiving his fifth amendment privilege and testifying at the first trial

had nothing to do with the information contained in the *Brady* material, because the information contained in the *Brady* material was relevant only to the $114,000 transaction with Mr. DiSalvo and was not relevant to the other counts about which Mr. Pelullo freely testified at considerable length. Simple logic dictates that if, as Mr. Whitaker testified, Mr. Pelullo's reason for testifying at the first trial was solely to contradict the government's witnesses regarding the $114,000 transaction with Mr. DiSalvo, then Mr. Pelullo would have had no reason to testify at the second trial when this issue was not presented to the jury. The fact that Mr. Pelullo waived his fifth amendment privilege and testified at the second trial when the $114,000 transaction was not at issue establishes beyond any doubt that Mr. Pelullo had an independent reason for testifying, totally unrelated to the subject matter of Count 54 and the information contained in the *Brady* material.

34. The conclusion that Mr. Pelullo would have testified in the manner that he did at the first trial even if the *Brady* material had been disclosed is supported by Mr. Pelullo's prior course of conduct with respect to waiver of his fifth amendment right. The government's evidence at the remand hearing established that Mr. Pelullo has a long history of voluntarily waiving his fifth amendment privilege, as demonstrated by the following circumstances:

(A) Between 1986 and 1991, Mr. Pelullo repeatedly

waived his fifth amendment privilege by testifying on numerous occasions under oath concerning the subject matter of the indictment, including: (a) his connection to Delta; (b) his personal use of loan proceeds; (c) payments to corporations controlled by Mr. Pelullo; and (d) his connection to and control of Royale. (Attachment A of government's proposed findings of fact and conclusions of law is a summary of the government's evidence pertaining to Mr. Pelullo's prior testimony, showing when Mr. Pelullo testified, the proceeding in which he testified, the subject matter of the testimony, and the relevance to the indictment and this remand hearing).

(B) Between 1986 and 1990, Mr. Pelullo voluntarily gave interviews about the subject matter of the indictment to FBI agents investigating this matter on three (3) occasions. (GX 9, 10, 11). The third interview was requested by Mr. Pelullo, was conducted in the presence of his attorney, Fred Schwartz, and with Mr. Pelullo's written consent was an on-the-record interview, that is to say, Mr. Pelullo agreed that anything he said during the interview could be used against him. See GX 11, page 1.

(C) On July 30, 1990, Mr. Pelullo testified in his own defense at his criminal trial in Cincinnati, Ohio for bribing a bank officer. (GX 4). On the following day, July 31, 1990, Mr. Pelullo was acquitted of all charges. (GX 5). Mr. Pelullo was represented by Glenn Whitaker.

(D) On January 25 and 26, 1993, Mr. Pelullo testified in his own defense at the second trial of this indictment. (GX 13, 14).

35. I find, based on my review of: (a) Mr. Pelullo's prior sworn testimony; (b) Mr. Pelullo's voluntary interviews with the FBI, two of which were in the presence of his attorney, Fred Schwartz; (c) Mr. Pelullo's testimony in the two trials in this criminal matter; and (d) this Court's own observations of Mr. Pelullo's demeanor and conduct, specifically his ability to control and manage his own defense; that Mr. Pelullo believed he could persuade the jury that he was telling the truth. However, after testifying in his own defense at the first and second trials and being convicted in both, it is more likely than not that Mr. Pelullo decided to try a different approach in the subsequent trials.

36. Moreover, Mr. Pelullo decided to waive his fifth amendment privilege and testify at the first trial on the advice of Mr. Whitaker. (TR. at 17.) Mr. Pelullo's choice of Mr. Whitaker to defend him in this case was understandable: less than a year earlier Mr. Whitaker had successfully defended Mr. Pelullo against a federal indictment charging him with bribery. The decision in that case to waive Mr. Pelullo's fifth amendment privilege and testify in the bribery case was obviously beneficial. I find that the acquittal Mr. Pelullo and Mr. Whitaker had recently achieved by waiving Mr. Pelullo's fifth amendment privilege in the Cincinnati

trial undoubtedly bolstered Mr. Pelullo's decision to once again waive his fifth amendment privilege and testify at the first trial.

37. Based upon all of the foregoing facts, I have no hesitation in concluding that Mr. Pelullo would have testified at the first trial in the manner that he did even if the government had disclosed the *Brady* material.

38. In his testimony at the remand hearing, Mr. Whitaker stated the specific reasons why Mr. Pelullo testified at the first trial: (a) to contradict the testimony of Agents Wolverton and Leyden regarding Mr. Pelullo's statements during the June 14, 1990 interview; and (b) to contradict Mr. Leonetti's testimony regarding contacts with Mr. Pelullo. The comparison of Mr. Pelullo's trial testimony with Mr. Whitaker's testimony at the remand establishes that Mr. Pelullo's after-the-fact explanation for waiving his fifth amendment privilege is not supported, but rather is contradicted, by the record of the first trial.

39. When pressed on cross-examination at the remand hearing, Mr. Whitaker eventually admitted that Mr. Pelullo decided to testify at the first trial, in part, so that he could tell the jury his version of what he had told Agents Wolverton and Leyden during the June 14, 1990 interview about the $114,000 transaction. (Tr. at 40). Agent Wolverton's rough notes contain the notation: "repaying intercompany debt." According to

Mr. Pelullo, this notation reflects a statement made by Mr. Pelullo during the June 14, 1990 interview:

> Agent Wolverton's notes indicate that Mr. Pelullo stated during the interview that the purpose of the $114,000 wire transfer was to "repay intercompany debt."

Brief Of Appellant Leonard A. Pelullo, U.S.C.A., 3d Cir., Nos. 95-1829; 95-1856, at 18 (Dec. 8, 1995).

40. If Mr. Pelullo waived his fifth amendment privilege so that he could tell the jury that he told the agents he used the $114,000 to "repay intercompany debt" during the June 14, 1990 interview, then one would expect that Mr. Pelullo would have testified at the first trial that he told the agents he used the $114,000 to "repay intercompany debt" during the June 14, 1990 interview.

41. At the first trial, Mr. Whitaker elicited the following testimony from Mr. Pelullo about the statement he allegedly gave to the agents during the June 14, 1990 interview:

> Q: What were the circumstances of the conversation--first of all, let me ask you this. Did you ever tell them at any time that this $114,000 that was wired to your father was to be used to repay a debt to Anthony DiSalvo?

A: I did not.
Q: Okay. What were the circumstances of the conversation?
A: I was there with Mr. Come, Mr. Wolverton and Mr.Laden (sic). And I was going over these different transactions and what was going on. I had voluntarily gone in there to speak to them and try and straighten this out. (...)
And basically I had run through all the transactions with Royale and the affiliates and at the end, the question was put to me by Mr. Laden (sic), not Mr. Wolverton, what about the 114,000, did that go to pay Tony DiSalvo? And I said I don't remember the 114,000 going to pay Tony DiSalvo, but I do have or did have a loan with Tony DiSalvo.
It was never a situation where I said it went to pay Tony DiSalvo, because it didn't.

GX 12 at 196-97 (emphasis added).

42. The record of the first trial establishes that when given the opportunity to testify that he told the agents he had used the $114,000 to "repay intercompany debt," Mr. Pelullo did not so testify. I find that it is inconceivable that a defendant would waive his fifth amendment privilege for the specific purpose of presenting important testimony about what he

allegedly said during an interview with government agents, and then simply not present the testimony.

43. Moreover, Mr. Pelullo's sworn testimony from the first trial regarding what he allegedly told the agents during the June 14, 1990 interview is far different from his after-the-fact contention that he told the agents he used the $114,000 to "repay intercompany debt." Mr. Pelullo testified: "I said I don't remember the 114,000 going to pay Tony DiSalvo, but I do or did have a loan with Tony DiSalvo." GX 12 at 197. The two versions of what Mr. Pelullo supposedly told the FBI agents are irreconcilable. It is clear beyond any doubt that Mr. Pelullo could not have been motivated to waive his fifth amendment privilege during the first trial so that he could testify that he told the agents he used the $114,000 to "repay intercompany debt" during the June 14, 1990 interview because Mr. Pelullo's sworn testimony from the first trial was that he said something entirely different to the agents during the June 14, 1990 interview.

44. With respect to Mr. Leonetti's testimony concerning contacts with Mr. Pelullo, Mr. Pelullo did deny generally that Mr. Leonetti and Mr. Scarfo discussed the DiSalvo loan with him. See GX 12, at 197-200. However, Mr. Pelullo admitted he was at Mr. Scarfo's house on two occasions. Mr. Pelullo did not deny that those occasions occurred in January of 1986. Nor did Mr. Pelullo deny that he met with Mr. Scarfo and Mr. Leonetti on either or both of those occasions.

Thus, as to Mr. Leonetti's testimony about his "contacts" with Mr. Pelullo at Mr. Scarfo's house in January of 1986, evidence Mr. Pelullo contends motivated him to testify, the trial testimony put forth by Mr. Pelullo to contradict Mr. Leonetti is equivocal at best.

45. Moreover, whether Mr. Pelullo met with Mr. Leonetti and Mr. Scarfo was not essential to proof of the offense charged in Count 54. Mr. Pelullo's general denial of having contacts with Mr. Leonetti and Mr. Scarfo regarding the DiSalvo loan would not contradict the government's other evidence showing Mr. Pelullo committed the fraudulent scheme charged in Count 54. The gravamen of Count 54 was that Mr. Pelullo fraudulently diverted corporate funds to his personal use. The essence of the defense Mr. Pelullo put forth in the first trial was that he was entitled to use the corporate funds for his personal benefit. As noted above, Mr. Pelullo called his father to testify that Mr. Pelullo was entitled to wire transfer the $114,000 to LRP and that the Pelullo family actually repaid Mr. DiSalvo with money from a different source. Mr. Pelullo's "entitlement" defense did not require Mr. Pelullo to contradict Mr. Leonetti's testimony about their contacts. Nor would testimony contradicting Mr. Leonetti as to whether there were contacts in January of 1986 rebut the government's other proof on this count.

46. Mr. Pelullo contends that he was motivated to

take the witness stand in his first trial and articulates two reasons therefore. Yet, when we read what he actually said at the first trial, with respect to those two motivating factors, we see that the testimony was vague and ambiguous at best. It is inconceivable to me under these circumstances that Mr. Pelullo would have given up his constitutional privilege only for the purpose of providing such vague and ambiguous testimony.

47. It is significant that Mr. Whitaker's closing argument at the first trial on behalf of Mr. Pelullo does not mention Mr. Pelullo's testimony that he now claims was so important. Although Mr. Pelullo contends that he was compelled to testify so that he could contradict the Agents' testimony that Mr. Pelullo admitted to using the $114,000 to repay Mr. DiSalvo, no mention was made of that testimony in his closing arguments. Instead of attacking the credibility of the government agents, Mr. Pelullo conceded for the sake of his closing argument that the $114,000 may have been used to repay Mr. DiSalvo as the government contended. Mr. Pelullo's attorney then argued that he was nevertheless entitled to use the money for this purpose:

> They have the burden, ladies and gentlemen, for a very good reason, because we are presumed innocent until proven guilty beyond a reasonable doubt. They have to show proof beyond a reasonable

doubt of no entitlement and there has been [no] such showing.

Let's talk about the third scheme. The third scheme is the $114,000 wire transfer from Palm Beach Heights, a deed consolidated subsidiary of the Royale Group to an account owned by LRP, Inc., a company owned by Peter F. Pelullo. Allegedly, that money, according to the Government is being used to repay a debt to Anthony DiSalvo (sic). Again, the question is, was the transfer itself, the $114,000 wire transfer, a transfer which was wrong? And ladies and gentlemen, the Government has failed to prove that it was.

It's undisputed that it went to LRP. Undisputed. And it's undisputed that LRP is owned by Peter F. Pelullo, Leonard Pelullo's father. It's undisputed that Peter Pelullo took that money from the account, issued checks on it. Those checks were written out for various amounts and they were cashed by Arthur Pelullo. $114,000 went into the account, $114,000 came out. It is also undisputed in this case, because there is no contrary testimony anywhere that Peter Pelullo was the driving force on this project. But for Peter Pelullo, this project could not have been completed.

Peter Pelullo was entitled to compensation for his work on that project. And he has testified and no one has disputed it that he received a total of a little over $300,000. And what was that made up of? It was made up of $114,000 which was wire transferred to him in February of 1986 for money that he had advanced on behalf of the corporation, money to which he had a direct entitlement,

Ladies and gentlemen, let's assume, let's assume that Peter Pelullo used that money to repay Tony DiSalvo (sic). Let's assume that what the Government has said is correct, and we deny it, and the evidence doesn't establish that that happened in any way, shape of (sic) form. But let's assume that he did that. You've got to ask yourself, so what? Because again, Peter Pelullo was entitled to the money as compensation and he could use that money anyway that he wanted to use it. And if he wanted to use it to repay a debt of his son, if he wanted to use is (sic) to take to the racetrack, if he wanted to use it to give it to his family, whatever it was that he wanted to do with it, it was his business.

Remember I asked Mr. Pelullo on the stand, questions about what happened to that money and one of the things that he

> said is I have never answered to anyone about the use of my money, but I will now because you're asking me. And that's the way it is. When it's your money, when you've earned it and you're entitled to it, you don't have to answer to anyone about it. And that's the problem with the Government's case. They have not shown a lack of entitlement to the money and without showing that lack of entitlement, their case falls. It collapses.

Attachment B, at 150-53, (emphasis added).

48. Mr. Pelullo's closing argument addressed the testimony of Mr. Leonetti in the following manner:

> They brought in a man named Phillip Leonetti, in this case, to try to paint a picture of Leonard pelullo (sic) having some contact with bad people. He's not charged with that. Mr. Leonetti talked about reaching out and putting pressure and muscle on Leonard Pelullo to repay a debt. He got victimized, Mr. Pelullo got victimized by an admitted ruthless murderer. And then he has been victimized by the Government by their bringing this man before you to try to make it appear that he, Mr. Pelullo is bad because he had some contact with these

people, that he borrowed money and had to pay it back.

Attachment B, at 160, (emphasis added).

49. Mr. Pelullo's summation during the first trial about Mr. Leonetti's testimony directly contradicts Mr. Pelullo's contention at the remand hearing that he testified for the purpose of contradicting Mr. Leonetti about contacts at Mr. Scarfo's house in January of 1986. Mr. Pelullo's argument that he was "victimized" by Mr. Leonetti presumes that Mr. Leonetti had contacted Mr. Pelullo and that Mr. Pelullo was forced to repay Mr. DiSalvo because Mr. Leonetti and Mr. Scarfo intervened.

50. My conclusion that Mr. Pelullo would have testified even if the government had produced the *Brady* material and therefore his decision to testify was unrelated to the *Brady* material, is reinforced by the representations of Dennis Richard, one of Mr. Pelullo's other trial attorneys, to the court during the first trial. After Mr. Pelullo had called several defense witnesses, the court, for scheduling purposes, inquired whether Mr. Pelullo could fill the remainder of the afternoon, a Friday, with other defense witnesses, including himself if he intended to testify.[4] Mr.

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[4] The exchange occurred on June 28, 1991, on a Friday afternoon at 2:51 p.m. when Mr. Pelullo informed the court that he needed an early recess because a witness he wanted to call

Richard explained that the defense intended to call one or two more witnesses before deciding whether to call Mr. Pelullo. The following colloquy occurred:

> Mr. COLE: Well, I just want to be sure that we understand who--if the defendant--if he is not going to take the stand--if he is going to take the stand, he can do it this afternoon. I don't want to come in here Monday morning and be told that the reason for the delay was because he is going to take the stand.
> Mr. RICHARD: We have other witnesses. We have to make a decision as to whether or not the defendant will take the stand. That's a decision--
> The COURT: I think you're playing games with me.
> Mr. RICHARD: No, we're not playing a game, Judge. Not at all. And it depends on--once this other testimony finishes up, one has to make a judgment whether or not it's necessary or not and that is a judgment that we have not made.

Attachment C, at 121-22 (emphasis added).

51. On July 1, 1991, the Monday following the above

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was unavailable until Monday.

sidebar, two additional defense witnesses testified before Mr. Pelullo did: Kevin Thomas (concerning mortgage documents) and John Cooney (concerning Mr. Pelullo's role as CEO). Neither of these witnesses testified about anything relating the DiSalvo loan or the $114,000 wire transfer. See Attachment D to Government's Proposed Findings of Fact and Conclusions of Law.

52. I find that Mr. Richard's contemporaneous representation that the decision whether Mr. Pelullo would testify depended on the testimony of the additional defense witnesses, and the fact that the testimony of these additional witnesses had no relevance to the $114,000 transaction, supports this Court's conclusion that Mr. Pelullo would have testified even if the *Brady* material had been disclosed prior to the first trial.

53. At the remand hearing, Mr. Whitaker testified that Mr. Pelullo had to testify for the following reasons:

> The reference is that a $114,000 wire transfer from
> the [PBH] debtor-in-possession account to LRP, Inc., was used to repay Tony DiSalvo. We felt it essential that we call Mr. Pelullo to respond to that, because quite frankly, there was no other way to deal with that issue.

> In addition, we felt that we were required to respond to the testimony of Mr. Leonetti about his contacts with Mr. Pelullo, and again, there was no one else available to deal with that, and there was no effective cross-examination material to deal with those witnesses.

(Tr. at 17).

54. Contrary to Mr. Whitaker's testimony, the record of the first trial and the remand hearing establish that Mr. Pelullo had other evidence to address the government's proof that Mr. Pelullo used the $114,000 to repay Mr. DiSalvo, which he cold have used instead of having Mr. Pelullo testifying. There was another witness to what occurred during the June 14, 1990 interview: Fred Schwartz. Mr. Schwartz was present at the interview as counsel for Mr. Pelullo. The court finds that Mr. Schwartz was subject to the court's subpoena power as of June 1991. (Tr. at 42). The court finds that calling Mr. Schwartz to testify about his observations of what Mr. Pelullo said during his interview with the agents would not constitute a waiver of an attorney-client privilege between Mr. Schwartz and Mr. Pelullo. Mr. Schwartz was no less competent to testify about what occurred during the interview than Mr. Pelullo was. Thus, Mr. Pelullo could have called Mr. Schwartz to testify about what was said during this meeting in lieu of waiving his fifth amendment privilege. Mr. Schwartz also took

contemporaneous notes during the June 14, 1990 interview. See Attachment F of government's proposed findings of fact and conclusions of law. Again, Mr. Schwartz' notes would have been as probative of what occurred during the interview as Mr. Wolverton's rough notes or Mr. Pelullo's own recollection. In sum, Mr. Pelullo could have used the testimony or notes of Mr. Schwartz to rebut the government agents about what occurred during the June 14, 1990 interview.

55. Moreover, Mr. Pelullo did call his father to testify at the first trial that his debt to Mr. DiSalvo was repaid with money from a source other than the $114,000 wire transfer, and at a date that contradicted the government's proof. Mr. Pelullo also presented documentary evidence to support his version of how he repaid Mr. DiSalvo. Mr. Pelullo's two brothers, Arthur and Pete, were also available to testify about Mr. Pelullo's version of how and when Mr. DiSalvo was repaid. (Tr. at 59.) The father's testimony directly contradicted the government's proof, including the testimony of the agents and Mr. Leonetti, that Mr. Pelullo used the $11400 wire transfer of PBH funds to repay Mr. DiSalvo.

56. In light of the evidence available to, and actually used by, Mr. Pelullo to defend against Count 54 at the first trial, I find that Mr. Pelullo's contention that "he was compelled to take the stand himself" because of the "government's failure to abide by its obligation under *Brady*," *see Pelullo*, 105 F.3d at 124, is not

supported, but rather is contradicted, by the record.

57. In weighing the credibility of Mr. Whitaker's testimony, I have considered the following factors: Mr. Whitaker spoke with Mr. Pelullo after the Third Circuit rendered its decision regarding the remand hearing. (Tr. at 66.) Mr. Whitaker reviewed the Third Circuit's opinion (Tr. at 15) and the *Brady* material before testifying at the remand hearing. (Tr at 31). Mr. Whitaker understood the purpose of the remand hearing. (Tr. at 15). Mr. Whitaker testified that the law firm he worked for when he represented Mr. Pelullo was still owed in excess of $100,000 in legal fees, which Mr. Whitaker hopes the firm eventually collects.

58. Mr. Whitaker testified that presenting a defense to the other 53 wire fraud counts did not factor in the decision to have Mr. Pelullo testify. (Tr. at 61, 63.) This statement was made, despite the fact that the overwhelming majority of Mr. Pelullo's testimony, and the overriding theme of Mr. Whitaker's closing argument, addressed Mr. Pelullo's "entitlement" defense to all of the wire fraud counts. Even if Mr. Pelullo successfully defended against Counts 54 and 55 by contradicting the government witnesses about the $114,000 transaction, Mr. Pelullo nevertheless faced a substantial sentence of imprisonment if convicted on Counts 1 through 53. (Tr. at 61.) I find it incredible that Mr. Pelullo would be motivated to waive his fifth amendment privilege in order to defend against one

wire fraud count but would not be influenced by the possibility of being found guilty of 53 additional wire fraud counts. The most serious allegations in the indictment involved the two schemes charging Mr. Pelullo with diverting over $2 million of Royale's loan proceeds. In contrast, Count 54, charged a scheme involving only one transaction of $114,000. In view of this, I have no doubt that Mr. Pelullo's reason for waiving his fifth amendment privilege at the first trial was to defend all charges in the indictment and not limited to defending against Count 54. In light of the testimony actually presented at the first trial and the closing argument of counsel and Mr. Pelullo's potential exposure on Counts 1 through 53, I do not accept Mr. Whitaker's testimony that presenting a defense to the other 53 wire fraud counts was not a factor in Mr. Pelullo's decision to testify at the first trial.

59. Mr. Whitaker's testimony that Mr. Pelullo waived his fifth amendment privilege so that he could contradict the testimony of Agents Wolverton and Leyden about Mr. Pelullo's inculpatory statements during the June 14, 1990 interview is directly contradicted by the record of what Mr. Pelullo actually testified to at the first trial. See supra, at Paragraph 21-23.

60. According to Mr. Whitaker, when Mr. Pelullo reviewed Agent Wolverton's formal report, Mr. Pelullo denied making the statement that he used the $114,000 to pay Mr. DiSalvo. (Tr. at 32). Mr.

Whitaker testified that Mr. Pelullo told him that he Pelullo in fact told the agents he used the $114,000 to pay "an intercompany debt." (Tr. at 34). If that were accurate, I would think that Mr. Whitaker would have demanded to see Agent Wolverton's rough notes to determine whether the contemporaneous notes of the interview contradicted the formal report and supported Mr. Pelullo's version of what allegedly occurred during the interview. Mr. Whitaker did not do this. Rather, Mr. Whitaker filed a pretrial motion asking only that the rough notes be preserved so that they would be available for use at trial, if necessary. Mr. Whitaker did not request to see the rough notes after Agents Wolverton and Leyden testified.

61. Moreover, Mr. Whitaker did not even attempt to cross-examine Agent Wolverton or Agent Leyden about the statement Mr. Pelullo contends he actually gave to the agents during the meeting. Mr. Whitaker did not need the rough notes to confront the agents about whether Mr. Pelullo had in fact told them he used the money to "repay intercompany debt" because, as Mr. Whitaker testified, Mr. Pelullo himself had told Mr. Whitaker that is what he said during the interview. See supra, at Paragraph 60. Mr. Whitaker's failure to even broach this subject during the cross-examination of Agents Wolverton and Leyden at the first trial raises a significant doubt that Mr. Pelullo told Mr. Whitaker before the first trial that he had made the statement "repaying intercompany debt" during his interview with the agents.

62. The same logic dictates that Mr. Whitaker would have also attempted to obtain Fred Schwartz's notes of the June 14, 1990 interview. Mr. Schwartz represented Mr. Pelullo at the interview and took notes. Presumably, if Mr. Pelullo in fact made the allegedly exculpatory statement that he used the $114,000 to repay an "intercompany debt," then Schwartz's contemporaneous notes would have been compelling corroboration of this fact. Mr. Whitaker had a significant lack of recollection at the remand hearing about this piece of evidence that could have been critical to Mr. Pelullo's defense. When asked what steps Mr. Whitaker undertook to obtain Mr. Schwartz's notes, Mr. Whitaker testified that he did not recall if he asked Mr. Schwartz for his notes. (Tr. at 45.) Mr. Whitaker admitted that he spoke with Mr. Schwartz during the first trial, but testified that he did not recall whether he asked Mr. Schwartz if he took notes during the June 14, 1990 meeting. (Tr. at 41). I find it is unlikely that Mr. Whitaker would have no recollection of attempting to obtain such a significant piece of evidence, particularly when this evidence could have been used instead of calling Mr. Pelullo to testify. A better explanation is that at the first trial that evidence simply was not significant to the defense until after the Third Circuit's *Brady* finding.

63. Mr. Whitaker's request at the time of the first trial to preserve, rather than produce, Agent Wolverton's rough notes, and his failure to recall taking steps to obtain Mr. Schwartz's notes, cast doubt upon his

current testimony that Mr. Pelullo had challenged the accuracy of Agent Wolverton's formal reports and had provided Mr. Whitaker with a different account of what Mr. Pelullo had told the agents.

64. Mr. Whitaker testified "there was no effective cross-examination material" to deal with Mr. Leonetti. In its most recent opinion, the Third Circuit agreed that the *Brady* material had "potential impeachment" value with respect to Mr. Leonetti. *Pelullo*, 105 F.3d at 123. However, the Third Circuit has also held that Mr. Pelullo had other effective impeachment material to challenge Mr. Leonetti's credibility during the first trial.

> Leonetti was subject to extensive cross-examination and impeachment. The defense attacked Leonetti's credibility by bringing to light the accounts of his murders and his desperate deals with the government in order to get out of prison sooner.

United States v. Pelullo, 14 F.3d at 887. In light of the impeachment material actually used by Mr. Pelullo during the first trial to attack Mr. Leonetti, Mr. Whitaker's statement that he had no effective cross-examination material without the *Brady* material is, at a minimum, an exaggeration of the circumstances Mr. Pelullo faced at the first trial.

65. Moreover, in a motion filed by Mr. Pelullo after the second trial but before the Third Circuit's Brady finding, Mr. Pelullo described Mr. Leonetti's trial testimony as being of "minuscule relevance." See, Attachment E, at pg. 2 of government's proposed findings of fact and conclusions of law. This motion is probative of the weight Mr. Pelullo actually attributed to Mr. Leonetti's testimony and the effect this testimony had upon Mr. Pelullo's decision to waive his fifth amendment privilege. This Court is unwilling to accept that a defendant would be motivated to waive his fifth amendment privilege to contradict testimony which the defendant characterizes as having "minuscule relevance," particularly when the defendant was able to describe this witness as a "ruthless murderer" based upon the evidence admitted at trial.

66. Mr. Whitaker testified that he would have used the surveillance logs to impeach Mr. Leonetti's testimony that there was a meeting at Mr. Scarfo's house in Florida with Mr. Pelullo. (Tr. at 23). However, this testimony is directly at odds with Mr. Whitaker's closing argument in the first trial where Mr. Pelullo conceded Mr. Leonetti contacted him about the DiSalvo loan. Mr. Whitaker argued that even though Mr. Leonetti "muscled" Pelullo into repaying the DiSalvo loan, Mr. Pelullo was entitled to use the $114,000 in this manner. Moreover, Mr. Whitaker acknowledged that numerous entries on the surveillance logs showing that an "unidentified white

male" had entered Mr. Scarfo's house could have been a reference to anybody, including Mr. Pelullo. (Tr. at 53). As the Third Circuit recognized, the surveillance logs "would do little, if any, to undermine Mr. Leonetti's testimony that he met with Mr. Pelullo at Mr. Scarfo's residence during [January 1986] to discuss the repayment of the DiSalvo loan". *Pelullo*, 105 F.3d at 123 n. 3. In light of the "questionable" impeachment value of the surveillance logs, Mr. Whitaker's testimony that having them available before the first trial would have influenced Mr. Pelullo's decision not to waive his fifth amendment privilege is not persuasive.

67. I do not believe that Mr. Leonetti's testimony about his contact with Mr. Pelullo had any effect upon Leonard Pelullo's decision to testify. Mr. Whitaker testified that Mr. Pelullo told him he was not present at Scarfo's Florida residence in January 1986, as Mr. Leonetti testified, but went there at a difference time. Mr. Pelullo's testimony fails to state when he in fact was there. I do not believe that Mr. Pelullo would waive his fifth amendment privilege so that he could contradict Mr. Leonetti's testimony only to present equivocal testimony which did not directly contradict Mr. Leonetti. Mr. Pelullo's primary theory of defense was that he was entitled to spend the $114,000 to repay DiSalvo or for any other purpose. Mr. Pelullo offered evidence to support a jury finding that he repaid DiSalvo with money from another source, whether Mr. Pelullo had contact with Mr. Leonetti was

really not that significant. The question was whether or not Mr. Pelullo used corporate funds to which he was not entitled.

68. The record of the first trial established a more plausible explanation as to why Mr. Pelullo testified as he did with respect to the $114,000 wire transfer. The government has produced other evidence to establish the existence of the DiSalvo loan (Vosbikian, Arthur Pelullo); the timing of the repayment to DiSalvo (McDonald, Arthur Pelullo); and Mr. Pelullo's admission that he used the $114,000 to repay DiSalvo (Wolverton, Leyden). It was beyond dispute that Mr. Pelullo wire transferred $114,000 from a bankrupt Royale subsidiary to a Philadelphia account on February 25, 1986. Accordingly, it is beyond question that Mr. Pelullo's reason for testifying was to offer an innocent explanation as to why he was entitled to the money--irrespective of what he did with the money. It would be of no consequence to this defense whether Mr. Pelullo ever met with Mr. Leonetti over the DiSalvo loan. (In fact, Mr. Pelullo acknowledged in his trial testimony that Mr. Leonetti had contacted Mr. Pelullo's brother, Peter, about the DiSalvo loan. *See* GX 12 at 198.)

69. The record of this criminal case is replete with irreconcilable inconsistencies from Mr. Pelullo. Mr. Pelullo gave one version, under oath at the first trial, of what he allegedly told the agents during the June 14, 1990 interview. See Paragraph 43. Mr. Pelullo

then advanced a different version of what he allegedly told the agents during the June 14, 1990 interview to persuade the Court of Appeal that he had been denied Brady evidence. See Paragraph 41. One of Mr. Pelullo's attorneys represented to this Court during the first trial that Mr. Pelullo's decision to testify depended on two witnesses who testified exclusively about the scheme charged in Counts 1 through 53. See Paragraphs 53-55. Another Pelullo attorney then testified at the remand hearing that Counts 1 through 53 had nothing to do with Mr. Pelullo's decision to testify at the first trial. See Paragraph 13. In a motion filed with this Court, Mr. Pelullo described Mr. Leonetti's trial testimony as having "minuscule relevance." See Paragraph 65. Mr. Pelullo then sought to establish at the remand hearing that this "irrelevant" testimony compelled him to waive his fifth amendment privilege.

CONCLUSIONS OF LAW

1. The government is required to prove by a preponderance of the evidence that Leonard Pelullo would have testified at the first trial even if the *Brady* material had been supplied to him.

2. The government has proven by clear and convincing evidence that Mr. Pelullo would have testified during his first trial even if the withheld material had been made available to him. I therefore find that Mr. Pelullo's trial testimony from the first

trial was not tainted by the *Brady* violation found by the Third Circuit in *United States v. Pelullo*, 105 F.3d 117 (3d Cir.1997) and is not subject to suppression under the exclusionary rule of *Harrison v. United States*, 392 U.S. 219, 88 S.Ct. 2008, 20 L.Ed.2d 1047 (1968).

I therefore make the following Order:

ORDER

AND NOW, this 9th day of June, 1998, the Defendant's Motion for a New Trial is DENIED.

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